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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 318

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1952

CERTIORARI GRANTED OCTOBER 27, 1952

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.)*, hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Rockaway News Supply Company, Inc., and Charles Waugh, Case No. 2-CA-1342."

In support of this petition the Board respectfully shows:

(1) Respondent is a New York Corporation engaged in business in the State of New York, within this judicial cir-

cuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on July 20, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors and assigns.

The aforesaid order provides as follows:

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of this right to assist Nassau County Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

Petition for Enforcement of an Order of the National Labor Relations Board.

(b) Discouraging activity on behalf of and membership in Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment, or any term or condition of employment, of its employees.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole Charles Waugh for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in Section V of the Intermediate Report, entitled "The remedy."

(c) Upon request, made available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New York, and at 45-35 36th Street, Long Island City, Queens County,[10] New York, copies of the notice attached hereto, marked "Appendix A". Copies of such notice, to be fur-

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words, "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

nished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Second Region (New York City) in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

(3) On July 20, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as

Appendix A Attached to Petition for Enforcement of an Order of the National Labor Relations Board.

set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C. this day of January, 1952.

APPENDIX A.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relation Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to assist NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 3 (a) (3) of the Act.

Appendix A Attached to Petition for Enforcement of an Order of the National Labor Relations Board.

WE WILL NOT discourage activity on behalf of and membership in NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL offer Charles Waugh immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of our discrimination against him.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of activity on behalf of any such labor organization.

All our employees are free to assist or refrain from assisting the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Decision and Order.

D-5258
Valley Stream, N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

—o—

In the Matter of
ROCKAWAY NEWS SUPPLY COMPANY, INC.,
and
CHARLES WAUGH.

Case No. 2-CA-1342.

—o—

On February 21, 1951, Trial Examiner Lee J. Best issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support of its exceptions, and the General Counsel and Waugh, the charging party, filed briefs in support of the Intermediate Report.

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the exceptions, modifications, and additions set forth below:

Decision and Order.

1. On March 7, 1950, the Respondent discharged Charles Waugh, a member of the Newspaper and Mail Deliverers' Union, hereinafter called the Union, which was the contractual representative of the Respondent's employees, because of his refusal, in the course of his duties, to cross a picket line established at the premises of the Nassau Daily Review Star by the Nassau County Typographical Union #915 (AFL), hereinafter called the Typographers. The Trial Examiner found that the Respondent thereby violated Section 8 (a) (3) and (1) of the Act. We agree.

The Respondent urges that Waugh's refusal to cross the picket line violated the no-strike clause of its agreement with the Union[1] and that his discharge was therefore not protected by the Act. In *Rockaway News Supply Company, Inc.*,[2] the Board found the identical contract involved herein to be illegal in its entirety and set it aside. It would not effectuate the policies of the Act to give effect in this case to a contract which the Board set aside in its entirety in a prior proceeding. Accordingly, the no-strike clause of that contract can have no impact upon Waugh's refusal to cross the picket line.[3]

The Respondent contends, however, that apart from the question of the validity of the contract, Waugh's conduct constituted a "partial strike" not protected by the Act.

[1] Sec. 19-n of the contract provides that "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award or order of the Adjustment Board."

[2] 94 NLRB No. 156.

[3] As the Board in the earlier *Rockaway* case, *supra*, set the entire contract aside, we regard as immaterial the fact that, as asserted by the Respondent, the contract provided for the severability of any portion thereof found to be illegal.

We do not agree. The record is clear that Waugh's failure to perform part of his duties was not occasioned by an insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or to alter his own terms and conditions of employment while remaining at work. In *Cyril de Cordova & Bro.*,[4] the Board found that an employee's failure to perform part of his duties by reason of his refusal to cross a lawful picket line at the plant of an employer other than his own was a protected form of concerted activity. Accordingly, for the reasons set forth in that case, we find this contention of the Respondent to be without merit.

Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent.[5] Instead the Respondent discharged Waugh.[6]

The Respondent seeks to distinguish the instant case from the *de Cordova* case on the ground that Waugh was not, as was the employee involved in that case, a member of the union conducting the picketing. We do not regard this dis-

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[4] 91 NLRB No. 187.

[5] *Pinaud, Incorporated,* 51 NLRB 235; *Gardner-Denver Company,* 58 NLRB 81.

[6] The record shows that after his discharge on March 7, Waugh returned the following day seeking to be rehired, but the Respondent told him, "You know I can't hire you. You're fired." Thereafter Waugh sought reemployment daily for a period of about 3 weeks but was told by the Respondent that it could not hire him. The record does not indicate, however, whether Waugh was willing to cross the picket line, if necessary, or whether he had been permanently replaced by the Respondent.

tinction as determinative.[7] The fact that employees who participate in concerted activities are not members of the same union, or indeed of any union, or employees of the same employer, does not alter the concerted nature of such activity or deprive it of the protection accorded such activity by the Act.[8] In refusing to cross the Typographers' picket line Waugh was making common cause and acting in concert with the Typographers.

2. We do not adopt the Trial Examiner's finding that the discharge of Waugh by the Respondent was a continuation of unlawful support rendered to the Newspaper and Mail Deliverers' Union to encourage membership in that organization, as no such violation was alleged or litigated.[9]

ORDER.

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Rockaway News Supply Company, Inc., Valley Stream, Nassau County, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to assist Nassau Coun-

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[7] The Intermediate Report in the *de Cordova* case stated: "Finn [the discharged employee] had a substantial and legitimate interest in the successful prosecution of the strike against the Exchange, *not only because of his union membership*, but also because of the reciprocal effect improved conditions in neighboring and associated business of like kind might have on his own future conditions of employment." (Emphasis added.)

[8] *J. G. Boswell Co.*, 136 F. 2d 585, 596 (C. A. 9); *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F. 2d 503 (C. A. 2); *Fort Wayne Corrugated Paper Co. v. N. L. R. B.*, 111 F. 2d 869, 874.

[9] We note, however, our finding in the earlier *Rockaway* case, *supra*, that the Respondent had unlawfully lent its support to the Newspaper and Mail Deliverers' Union in violation of Section 8 (a) (2) of the Act.

ty Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(b) Discouraging activity on behalf of and membership in Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment, or any term or condition of employment, of its employees.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make whole Charles Waugh for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in Section V of the Intermediate Report, entitled "The remedy."

(c) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New

York, and at 45-35 36th Street, Long Island City, Queens County, New York, copies of the notice attached hereto, marked "Appendix A".[10] Copies of such notice, to be furnished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region (New York City) in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Signed at Washington, D. C. July 20, 1951.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JOHN J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

(Seal) NATIONAL LABOR RELATIONS BOARD.

[10] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted, before the words, "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

Appendix A Attached to Decision and Order.

D-5258

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to assist NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT discourage activity on behalf of and membership in NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL offer Charles Waugh immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of our discrimination against him

Appendix A Attached to Decision and Order.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of activity on behalf of any such labor organization.

All our employees are free to assist or refrain from assisting the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Intermediate Report.

IR-417

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

Washington, D. C.

In the Matter

of

ROCKAWAY NEWS SUPPLY COMPANY, INC.

and

CHARLES WAUGH.

Case No. 2-CA-1342.

Miss Helen F. Humphrey, for the General Counsel.

Hyman Waldman, Esq., of New York, N. Y. for the Charging Party.

Julius Kass, Esq., and Richard L. Halpern, Esq., (Bandler, Haas & Kass), of New York, N. Y., for the Respondent.

STATEMENT OF THE CASE.

Upon a charge filed by Charles Waugh, herein called the Charging Party, on April 7, 1950, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Second Region (New York, New York), issued a complaint dated November 8, 1950, against Rock-

[1] For identification separately called herein the General Counsel and the Board.

away News Supply Company, Inc., herein called the Respondent, alleging that the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act.

With respect to the unfair labor practices, the complaint alleges in substance that the Respondent, on or about March 7, 1950, discharged Charles Waugh, and thereafter failed and refused to reinstate him, for the reason that he refused to cross a picket line maintained by the Nassau County Typographical Union #915 (AFL), herein called the Typographical Union, and thereby engaged in concerted activities with other employees for the purpose of mutual aid or protection.

Copies of the complaint, charge, and a notice of hearing thereon, were duly served upon the Respondent and Charles Waugh.

Thereafter the Respondent filed an answer to the complaint, admitting the discharge and refusal to reinstate Charles Waugh, but denied that such actior constituted unfair labor practices. As an affirmative defense, the Respondent alleges in substance that pursuant to a collective bargaining agreement entered into by and between the Newspaper and Mail Deliverers' Union of New York and Vicinity and the Respondent, the Adjustment Board, therein constituted, found that Waugh was discharged for cause: and that by virtue of the collective bargaining agreement, the National Labor Relations Board is barred from ordering the reinstatement of the Charging Party.

Intermediate Report.

Pursuant to notice, a hearing was held at New York, New York, on December 1, 1950, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues involved.

Ruling on a motion by the General Counsel to strike the affirmative defense was reserved. Motion by the Respondent to dismiss the complaint for failure to state a cause of action was denied. Motion by the Respondent to exclude individual counsel of the Charging Party from participation in the hearing was denied under Section 203.38 of the Board's Rules and Regulations, Series 5. Motion by the Respondent to dismiss when the General Counsel rested was denied with leave to renew at the close of all the evidence. Upon renewal of the motion, ruling thereon was reserved, and is now denied. Motion by the General Counsel to conform the pleadings to the proof was granted without objection.

Opportunity was afforded all parties to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law. Briefs received from the General Counsel, counsel for the Charging Party, and the Respondent have been given due consideration.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of the Respondent

Rockaway News Supply Company, Inc., is a corporation organized and existing by virtue of the laws of the State of New York with its principal office and place of business located at 518 Rockaway Avenue, Valley Stream, Nassau County, New York. It also maintains a place of business at 45-35—36th Street, Long Island City, Queens County, New York. At all times herein concerned, it was engaged in and continues to engage in the sale, distribution, and delivery of newspapers, magazines, periodicals, and other publications to stores, newsdealers, and other retail distributors, pursuant to consignment contracts with the publishers. Pursuant to exclusive publisher franchises for their distribution in several counties in Long Island, New York, it has delivered and continues to deliver such newspapers as the New York Times, New York Herald Tribune, New York World-Telegram and Sun, New York Post, New York Mirror, and New York Journal-American; which are recognized channels and instrumentalities of interstate commerce, and utilize the facilities of one or more interstate and world-wide wire services, such as the Associated Press, the United Press, and the International News Service.

During the past year, the publisher of each of the above-named newspapers caused to be shipped in interstate commerce from its respective New York plants to States of the United States outside of New York newspapers valued in excess of $25,000. In the course and conduct of its business during the same period, the Respondent transported approximately 35 percent of the newspapers it handled from

their places of publication in New York, New York, to its places of business and to the retailers by whom they were sold. During the same period the Respondent returned magazines valued in excess of $25,000 to publishers located outside the State of New York by shipment in interstate commerce.

During the past year in the course and conduct of its business, the Respondent performed services valued in excess of $50,000 in the distribution of the aforesaid publications.

It is found, therefore, and the Respondent concedes, that Rockaway News Supply Company, Inc., is engaged in commerce within the meaning of the Act.

II. The labor organizations involved

The Newspaper and Mail Deliverers' Union, and Nassau County Typographical Union #915 (AFL) are labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. *Historical background*

For approximately 7 years prior to 1950, Charles Waugh was employed by the Respondent as a chauffeur and routeman. By reason of seniority he was classified as a regular situation holder. He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which for a period of years had been contractually recognized by the Respondent, without the formality of an election, as the exclusive bargaining representative of its employees.

Intermediate Report.

At the time of his discharge, Waugh was assigned to a regular route, and worked 5 days a week (Tuesdays through Saturdays) from 9:45 a. m. to 6:30 p. m. As a routeman, it was his duty to pick up and deliver various newspapers, magazines, and periodicals along a scheduled route, including the Nassau Daily Review Star, herein sometimes called the Review Star. This newspaper was published by The Daily Review Corporation, Rockville Center, Long Island, New York, and customarily came off the press at 10 a. m. Prior to 10:30 a. m. on each working day, except Saturdays, Waugh picked up a supply of this newspaper at the premises in Rockville Center, and proceeded on his usual route with pickups and deliveries. The pickup operation of the Review Star at Rockville Center consumed approximately 10 or 15 minutes each day.

B. *Events leading to Waugh's discharge*

On the morning of March 2, 1950, Waugh discovered that the Typographical Union, of which he was *not* a member, had established pickets before the premises of the Review Star, which prevented a pickup of that newspaper unless he passed through the picket line. First assuring himself by conference with John J. Byrnes, vice president of the Typographical Union, that the picketing had been ordered and approved by that labor organization in connection with a labor dispute, Waugh notified his foreman (William Gordon) that because he was himself a union man, he would not cross the picket line of another union, and thereby become a "scab" or strike breaker. Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job." Waugh, nevertheless, insisted that he would not do harm to another union, and requested that some arrangement be

made to have the newspapers delivered to him beyond the picket line, so that union men would not be required to cross it. It is clear that Waugh was willing to continue in the performance of all his duties, provided he was not required to cross the picket line. Such an arrangement was made by the Respondent on Thursday and Friday of that week, but on Tuesday, March 7, 1950, Foreman Gordon said to Waugh, "The Management wants you to cross that picket line. * * * I order you to cross the Nassau Daily Review Star picket line up there and draw papers. * * * Otherwise you are fired; if you refuse, you are fired." Thereupon, Waugh left Respondent's premises, but returned to the premises each succeeding day for a period of about 3 weeks seeking to be rehired. Gordon told him that he could not give him employment.

It appears that other employees of the Respondent did not refuse to pass through the picket line, although they were members of the Newspaper and Mail Deliverers' Union. On March 8 and 9, 1950, pickets of the Typographical Union carried placards containing the following inscription: "Is Waugh the only union mail deliverer?"[2]

C. *Defenses raised by Respondent seeking to justify discharge for cause*

It is contended by the Respondent:

(1) That Waugh's refusal to cross the picket line of a union of which he was not a member is not protected activity within the meaning of the Act.

(2) That Waugh's refusal to obey the order of his foreman and cross the picket line to perform his job was insub-

[2] Ruling on the admissibility of this evidence was reserved, and it is now admitted.

ordinate conduct and a violation of the so-called "partial strike doctrine."

(3) That Waugh's refusal to cross the picket line constituted a breach of contract in violation of the "no strike" clause contained in its collective bargaining agreement with the Newspaper and Mail Deliverers' Union of October 25, 1948.

(4) That decision and award of the Adjustment Board in accordance with grievance procedure outlined in the contract is conclusive and binding upon the Charging Party, and is a bar to exercise of jurisdiction by the National Labor Relations Board herein.

D. *The collective bargaining agreement*

The Respondent relies upon and is seeking to enforce a collective bargaining agreement dated October 25, 1948. That agreement recognized the Newspaper and Mail Deliverers' Union of New York and Vicinity as exclusive bargaining representative for Respondent's employees, provided procedure for the adjustment of grievances by an Adjustment Board, exclusive of other remedies, and contained a "no strike clause." Pertinent provisions of the contract read, as follows:

SECTION 1

1-a. Subject to the provisions hereinafter set forth, the Employer recognizes the Union as the exclusive representative for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed

by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men.

* * * * *

SECTION 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

2-c. The parties hereto agree that when a definition or interpretation of the 30 day period has been handed down by law, then such definition or interpretation shall thereafter govern in so far as this contract is concerned.

SECTION 3

Mutual Guarantees

Because of the enactment of the Labor-Management Relations Act, 1947, this contract differs from its immediate predecessor and from contracts between these parties over a period of many years. Specifically, this

agreement eliminates closed shop, and references thereto because it no longer is permissible under the federal law. This provision is appended hereto as an appendix to, but not as a part of, this contract.

It is understood and agreed, however, for the duration of this contract, that if any provision as shown in the appendix hereto, and as modified from the preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof.

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is mutually agreed that the spirit as well as the letter of this agreement is to be observed in full and that neither party will enter into any other agreement which in any way renders impossible or inoperative any provision of this contract.

* * * * *

APPENDIX

(Section number refers to prior contract)

2. The Union shall furnish at all times and at regular time rates as many men as may be required by the Wholesaler, such men to be competent and able to perform the particular operation for which they are required. If a Wholesaler requires his regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift. When the Union fails to furnish such men promptly the Wholesaler is authorized to meet his needs by employing such men as he may be able to obtain; if the men so employed are not members of the Union they shall be employed only so long as the Union does not furnish members of the Union willing and qualified to take their places, but any man so employed shall be allowed to complete his day's work. Nothing herein contained is to be construed as conferring of power upon Wholesaler to fill a regular situation with anyone not a member of the Union.

* * * * *

SECTION 4

The Employer shall have the right to appoint as many foremen and assistant foremen as it may see fit and shall have the right of removal. The terms of a foreman or assistant foreman's employment, including hours, wages and other conditions of work, shall be a matter of agreement between the Employer and such foreman or assistant foreman, except that no foreman or assistant foreman shall be paid less than

the basic hourly rate agreed to herein. Present practice may be continued by the Employer as to foreman and assistant foreman performing any of the operations covered in Section 1 herein. Only the foreman or assistant foreman in charge shall be empowered to execute the provisions, terms and conditions hereof pursuant to the directions of the Employer, to issue orders, to hire or to discharge, and no one except the foreman or assistant in charge shall have the right, in accordance with such directions, to issue orders and make changes in working conditions. Any employees having a complaint to make with respect to the conduct or orders of a foreman or assistant foreman or with respect to alleged discrimination or other unfair treatment by the foreman or assistant foreman may take up such complaint with the person designated by the Employer for such purpose through the chapel chairman or other Union representative, and if such complaint is not satisfactorily disposed of, it may be submitted to the Adjustment Board. The Employer may make complaint that the Union has improperly imposed penalties upon foremen or assistant foremen for carrying out the orders or instructions of the Employer and if the complaint be not satisfactorily adjusted, the same may be submitted to the Adjustment Board.

* * * * * *

SECTION 12.

12-a. The right of the Employer, acting through a foreman or an assistant foreman at any time to discharge any employee for cause is hereby recognized. The cause shall be stated at the time of the discharge.

The discharged employee may, through his Union representative, make complaint with respect to his discharge to the Employer, and if such complaint be not satisfactorily adjusted, it may be submitted to the Adjustment Board. Pending adjustment and determination of such complaint the discharged employee need not be kept in employment by the Employer.

* * * * *

SECTION 13.

Any employee claiming to have been discharged without just cause or otherwise deprived of or injured with respect to any of the rights conferred upon him hereunder may have such claim taken up on his behalf with the Employer through the proper Union representatives, and in the event that such claim is not satisfactorily adjusted, the Union may submit the same to the Adjustment Board.

* * * * *

SECTION 19.

19-a. There is hereby created an Adjustment Board to function with the powers and duties herein conferred during the term hereof.

* * * * *

19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board.

* * * * *

E. *Concluding findings*

1. Protected activities except as affected by an agreement authorized in Section 8 (a) (3) of the Act

It is of first concern to determine whether Charles Waugh refused to cross a *legitimate* picket line. I take judicial notice of a decision of the Board in *Nassau County Typographical Union #915 (AFL)*, 87 NLRB 1263, wherein it was held that said union was on October 22, 1947, and thereafter, the exclusive representative in the appropriate unit of employees of The Daily Review Corporation. There is no evidence that it has since lost its majority or been decertified by the Board. John J. Byrnes, vice president in charge, testified without contradiction that the picket line was established pursuant to a formal resolution of Typographical Union #915 in connection with a labor dispute of long standing. It is, therefore, concluded that the picket line was legitimate.

It has long been established by the Board and the courts that refusal to cross a legitimate picket line is a form of protected activity under Section 7 of the Act, and that a discharge therefor is violative of the Act as an unfair labor practice.[3] The fact that Waugh was not a member of the picketing union is immaterial.[4]

I do not agree with the contention of the Respondent that Waugh's conduct was illegal under the "partial strike doctrine" enunciated in a list of court decisions cited in its brief. All of those cases hold in substance that employees are not protected by the Act when attempting to accomplish

[3] *Illinois Bell Telephone Company*, 88 NLRB No. 191; *Cyril de Cordova & Bros.*, 91 NLRB No. 187.

[4] *Fafnir Bearing Co.*, 73 NLRB 1008; *New York Telephone Company*, 89 NLRB No. 45; *N. L. R. B. v. Montag Bros. Inc.*, 140 F. 2d 714.

an unlawful objective by unlawful methods, or even a lawful objective by illegal means. While remaining on the job, employees may not refuse to perform a part of the allotted task in defiance of reasonable instructions from the employer, nor unilaterally prescribe the terms upon which they will work. Not so in the present case. Waugh was not seeking an unlawful objective, but was clearly exercising the right of employees to assist a labor organization by utilizing a conventional method, time-honored in the history of the American labor movement. I cannot find from the evidence, as argued in Respondent's brief, that an effort was being made to exert pressure on his own employer to cease dealing with the *Review Star;* because Waugh was entirely willing to handle the newspapers if delivered to him beyond the picket line. Had he been engaged in a secondary boycott to force his employer to cease dealing in the products of The Daily Review Corporation, protection would in that case be afforded by the proviso of Section 8 (b) (4) of the Act, "That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." It seems to me that Waugh's being the only employee of the Respondent who refused to cross the picket line has no significance, since the rights under Section 7 of the Act may be exercised either individually or collectively.

I find, therefore, that Waugh's refusal to cross the picket line of the Typographical Union was protected activity except to the extent that such right may be affected by an

agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Effect of the agreement of October 25, 1948

The Respondent recognized the Newspaper and Mail Deliverers' Union as exclusive bargaining representative of its employees without the formality of an election. Such recognition was not in itself illegal, but all employers are precluded by the Act from entering into a contract containing the union-security provision which required as a condition of employment membership in the Newspaper and Mail Deliverers' Union on or after the thirtieth day following the effective date of said agreement. A contract with a labor organization, containing the aforesaid provision, is valid under the Act, only when two conditions have been complied with, to wit: (1) If such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made; and (2) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such agreement.[5] In this case no union-shop election has been held in compliance with the proviso in Section 8 (a) (3) and the terms of Section 9 (e) of the Act. The union-security provision in the contract was not conditioned on ratification by such an election. Records of the Board disclose that the Newspaper and Mail Deliverers' Union filed UA petitions involving employees of the Respondent in December

[5] See first proviso in Section 8 (a) (3) of the Act.

1949, but on January 4, 1950, requested leave to withdraw them.[6] Incorporation of the union-security provision in the contract, under the circumstances of this case, is violative of the Act, whether or not it is enforced.[7]

It is well established that an unauthorized union-security provision is violative of Section 8 (a) (1), (2), and (3) and 8 (b) (2) of the Act, and that the contract in which it appears will be set aside by the Board.[8] The saving clause contained in section 2-c of the contract could not save the instant contract from illegality, because it does not expressly provide that the operation of the union-security provision was to be conditioned upon compliance with the provisions of Section 9 (e) of the Act.[9]

I shall hold, therefore, that the collective bargaining agreement of October 25, 1948, was illegally entered into by the Respondent, and cannot be utilized to restrain its employees in the exercise of the rights guaranteed in Section 7 of the Act. I do not decide whether Waugh's refusal to cross the picket line of Nassau Typographical Union #915 (AFL) would otherwise be a breach of the no-strike clause (19-n) contained in the contract.

Having held that the contract is illegal, it follows that the Board will not recognize any interpretation of its provisions by the Adjustment Board, or its decision and award attempting to enforce the terms thereof. It would not effec-

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[6] See: *Suburban Wholesalers, Inc.*, 2-UA-3690; and *Rockaway News Company*, 2-UA-5439-60.

[7] *C. Hager & Sons Hinge Mfg. Co.*, 80 NLRB 163.

[8] *Salant & Salant, Incorporated*, 87 NLRB 215; *Julius Resnick, Inc.*, 86 NLRB 38. Issues as to the validity of the identical instant contract are now pending before the Board in *Rockaway News Supply Company, Inc.*, 2-CA-617, 2-CB-190.

[9] *Schaefer Body, Inc.*, 85 NLRB 195; *Unique Art Manufacturing Co.*, 83 NLRB 1250; *Lykens Hosiery Mills, Inc.*, 82 NLRB 981.

tuate the policies of the Act to condone the unfair labor practices of the Respondent and the Newspaper Mail Deliverers' Union in entering into such a contract, by enforceing provisions in conflict with the rights of employees guaranteed in the Act. Motion of the General Counsel to strike the affirmative defense based upon enforcement of the contract, which is set forth in paragraphs 5, 6, 7, 8, and 9 of Respondents' answer to the complaint, is therefore granted.

I further find that the discharge of Charles Waugh by the Respondent was a continuation of unlawful support rendered to the Newspaper and Mail Deliverers' Union to encourage membership in that labor organization. On the other hand, it is apparent that the discharge of an employee for engaging in concerted activity with employees of another employer, and refusing to cross a legitimate picket line of their union, has a tendency to discourage membership in that labor organization. The discouraging effect in this case was evidenced by the appearance of placards on the picket line of Nassau Typographical Union #915 calling attention to the incident.

It is my conclusion that the Respondent engaged in, and is engaging in, unfair labor practices by discrimination in regard to the hire and tenure of employment of Charles Waugh to encourage or discourage membership in labor organizations.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, inti-

mate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom, and take affirmative action in order to effectuate the policies of the Act.

I have found that the Respondent entered into an illegal agreement with the Newspaper and Mail Deliverers' Union, and that it should not be enforced against individual employees in restriction of the exercise of the rights guaranteed by Section 7 of the Act; but inasmuch as the charge and complaint herein is limited to a specific violation of Section 8 (a) (1) and (3) of the Act, I shall make no recommendations as to other violations, if any, concerning the contract of October 25, 1948.

Finding that the Respondent discharged Charles Waugh in violation of Section 8 (a) (1) and 8 (a) (3) of the Act, I shall recommend that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position,[10] without prejudice to his seniority or other rights and privileges, and that the Respondent make him whole for any loss of pay he may have suffered as a result of the discrimination by payment to him of a sum of money equal to the amount he would have earned from the date of his discharge to the date of offer of re-

[10] See: *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

instatement less his net earnings[11] to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB No. 41. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other such period. It will also be recommended that the Respondent make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW.

1. Nassau County Typographical Union #915 (AFL), and Newspaper and Mail Deliverers' Union of New York and Vicinity are labor organizations within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Charles Waugh, thereby encouraging or discouraging membership in labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

[11] *Crossett Lumber Company,* 8 NLRB 440.

RECOMMENDATIONS.

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Rockaway News Supply Company, Inc., its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to join or assist the Newspaper and Mail Deliverers' Union of New York and Vicinity, or Nassau County Typographical Union #915 (AFL), or any other labor organization, and to engage in concerted activities for the purpose of mutual aid and protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(b) Encouraging or discouraging membership in the Newspaper and Mail Deliverers' Union of New York and Vicinity, Nassau County Typographical Union #915 (AFL), or any other labor organization, by in any manner discriminating in regard to the hire or tenure of employment of its employees, or any term or condition of employment.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act:

(a) Offer to Charles Waugh immediate and full reinstatement to his former position, or to a substantially equivalent position, without prejudice to his seniority and other

rights and privileges, and make whole Charles Waugh for any loss of pay he may have suffered by reason of the discrimination against him, in the manner provided herein in the section entitled "The remedy."

(b) Post immediately at its places of business at 518 Rockaway Avenue in Valley Stream, Nassau County, New York, and at 45-35—36th Street, Long Island City, Queens County, New York, copies of the notice attached hereto, marked Appendix A. Copies of such notice, to be furnished by the Regional Director for the Second Region, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and maintaind by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Second Region (New York City) in writing within twenty (20) days from the date of the receipt of this Intermediate Report what steps the Respondent has taken to comply therewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the Respondent notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C., this 21st day of February, 1951.

LEE J. BEST,
Trial Examiner.

Appendix A Attached to Intermediate Report.

APPENDIX A.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT encourage or discourage membership in the NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, or NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, by discriminating in any manner with regard to the hire and tenure of employment of our employees, or any term or condition of employment.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to join or assist the NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, or NASSAU COUNTY TYPOGRAPHICAL UNION #915 (AFL), or any other labor organization, to engage in concerted activities for the purpose of mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Charles Waugh immediate and full reinstatement to his former or substantially equivalent

position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organizations.

All our employees are free to become, remain, or refrain from becoming members of the above-named unions or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

ROCKAWAY NEWS SUPPLY COMPANY, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[1] **Stenographic Transcript of Testimony.**

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION.

In the Matter
of
ROCKAWAY NEWS SUPPLY COMPANY, INC.,
and
CHARLES WAUGH.

Case No. 2-CA-1342.

270 Broadway,
New York, New York,
Friday, December 1, 1950.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a. m.

Before: Lee J. Best, Trial Examiner.

Appearances:

Helen F. Humphrey, Counsel for the General Counsel, National Labor Relations Board.

Hyman Waldman, Esq., 305 Broadway, New York, New York, appearing on behalf of the Charging Party.

Bandler, Haas & Kass, by: Julius Kass, Esq., of Counsel, 11 Broadway, New York, New York, appearing on behalf of the Respondent.

• • •

[3] PROCEEDINGS

* * *

[17] Miss Humphrey: Mr. Examiner, I have asked the Reporter to mark as General Counsel's Exhibit 2 for identification a stipulation on Commerce, which Mr. Kass has kindly agreed to enter into in the interest of expediting this proceeding, and to which I understand Mr. Waldman has no objection. I offer General Counsel's Exhibit No. 2 in evidence.

Trial Examiner Best: Let the stipulation be admitted, without objection.

(Stipulation on Commerce above referred to was marked General Counsel's Exhibit No. 2 for identification and received in evidence.)

* * *

[23] CHARLES M. WAUGH, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * *

[24] Direct Examination:

Q. (By Miss Humphrey)

* * *

Q. Have you been employed by Rockaway News Supply Company? A. I have been employed by them.

Q. For approximately how long were you employed by them, sir? A. Between seven years—approximately seven years.

Q. On what date did your employment terminate? A. It terminated on March 7th, 1950.

Q. Now, what duties were you performing at the time of the termination of your employment? What was your job title, sir? A. As chauffeur and routeman.

[25] Q. Was that characterized in any other fashion, that job? To refresh your recollection, were you a regular situation-holder? A. I was a regular situation-holder.

Q. Will you define what that means? A. A regular situation-holder means that if you are employed in a place more than five weeks, on a five-day a week basis, you automatically become under contract a steady situation-holder. In the job I hold, I held it through the right of seniority. Those jobs were put on the board for bids and through seniority rights under the contract, I automatically was able to pick one of these jobs and this was the job I was on at the time of discharge.

Q. In that job, was it necessary for you to shape for employment, or did you have a regularly assigned route, regularly assigned to you? A. I had a regular route, and time and days off assigned me.

Q. When I refer to shape, will you state for the record what is meant by that term in that industry? A. Well, shape means that if you appear on the premises of any publisher or news company for work, you took your place according to seniority, and you were employed according to senority, and you shape there if you are not a steady situation-holder.

Q. As you were at the time of your discharge? [26] A. As I was at the time of my discharge.

Q. How long had you been so employed as a regular situation-holder? A. I think it was approximately four years, approximately four years.

Q. Were you working days or nights at the time? A. I was working days at the time of discharge.

Q. And what hours were you working, sir? A. My hours were from 9:45 a. m., till 6:30 p. m.

Q. How many days a week were you working? A. That was five days a week, from Tuesday to Saturday.

Q. Now, referring to the time of your termination, will you state for the Examiner in some detail what your duties involved from the time you reported in the morning until you left at night? A. At 9:45 I appeared at the Rockaway News premises and I took a truck from the premises and went to the Nassau Daily Review Star. I arrived approximately at the Nassau Daily Review Star around 10 a. m. The Nassau Daily Review Star generally went to press at 10 o'clock a. m. I drew approximately about six loads of newspapers for the R view Star. I was under orders that if the Nassau Review Star did not go to press in time, I should leave there by 10:30 and proceed on with my next portion of my work, which was to go to the Newsday, in Hempstead, a newspaper called the [27] Newsday in Hempstead, and draw papers from there, which amounted to about 26 loads of papers, and then my next stop was the Floral Park Railroad Station and I would appear there about 11 o'clock and distribute to another route dealer portions of the load of the Newsdays and the Review Stars. At that point I would pick up New York Journals, and from that point on I would proceed and serve 17 dealers between Floral Park and Mineola, proper, in the town of Mineola.

That would dispense with all the papers that I had on the truck at the time.

From there on I would proceed to the Railroad Station at Freeport. There, there would be the Nassau Daily Review papers, the Journal, the Post, the Sun, the Telegram and the Newsday. Those are the papers I would take in my truck and distribute throughout North Bellmore, Bellmore,

Merrick, and then I would return—there was, I think, in that area, I had about 30 dealers to serve there. Each dealer would receive a portion of each paper that I had in the truck, hand-counted, and each dealer would get that portion, his order, whatever his order was of the individual papers. I would serve him directly.

From there, that would finish me up approximately around 2 a. m., 2 o'clock or 2:30. It all depends if the papers were on time. Then the next portion of my work was at 4:30. The Journals would arrive at Freeport Station.

[28] Q. That is the New York Journal? A. The New York Journal would arrive at the Freeport Station. We would wait then for the five o'clock train or the five minutes to five train, and we would have the Post, the Telegram and the Sun. Then I would deliver those papers to Roosevelt, North Merrick and Merrick, and then I would go right back to the main branch and my day's work was finished.

Q. How many days a week did you make a stop at the Nassau Daily Review Star? A. Four days a week. Saturday I did not have to stop at the Nassau Daily Review.

Q. Who was your immediate supervisor at the time of your discharge? A. The foreman who had immediate charge over me was a man named Mr. Gordon, Mr. W. Gordon, William Gordon.

Q. William Gordon? A. William Gordon.

Q. Do you know what his title was? A. Foreman on the day delivery.

Q. Now, directing your attention to the period immediately preceding March 7th, 1950, I ask you whether on any occasion you discussed with Mr. William Gordon daily deliveries of the Nassau Daily Review Star? A. On the—

Q. Just answer, did you have any conversations with him? A. Yes, I did.

[29] Q. Did you have one or more than one? A. I had more than one. I had two conversations.

Q. When did the first conversation occur? A. The first conversation occurred on Thursday morning.

Q. Thursday morning preceding your discharge? A. Preceding my discharge.

Q. That would be on Thursday morning, March 2nd? A. March the second.

Q. And where did this conversation take place? A. In the premises in the Rockaway News Supply Company in Valley Stream.

Q. Was anybody else there? A. No, there was nobody else present at the time.

Q. Will you state what was said by Mr. Gordon and by you on this occasion? A. I had found out, when I appeared for work at 9 o'clock—I generally get there a little early—when I appeared for work at 9 o'clock, the Shop Chairman had informed me that there was a picket line in front of the Nassau Review Star.

Q. When you say "Shop Chairman" what do you mean? A. He is the Chairman, the Union Chairman.

Q. What union is that, sir? A. The Newspaper and Mail Deliverers Union.

Q. Very Well,— A. He had informed me that there was a picket line in front of the Nassau Review Star.. So I immediately made inquiries [30] to find out whose picket line it was, and I was informed by Mr. Byrnes, who, to my knowledge, is a member of Local No. 915, International Typographical Union—

Q. Is that Mr. John Byrnes? A. Mr. John Byrnes—that there was a picket line, and that being familiar with

the Nassau Review labor troubles, I knew that—I asked him if it was a continuation of the same trouble that they had before. He informed me that it was, so, then, I immediately informed Mr. Gordon that under the circumstances, that it was my estimation it was a legal picket line, that I, as a union man, would not cross that union picketline and thereby become a scab or a strike-breaker. So Mr. Gordon told me that, "Charlie", he said, "I wouldn't take that attitude. It might mean your job." I said, "Mr. Gordon, if it means my job, I still have to maintain my right as a union man that I cannot harm another union, especially when they hold a legal picket line, which I know they do."

So after arguing pro and con on it, I said to him, "Why can't you go to your employer, Mr. Somyak, and ask him if he couldn't get papers delivered from the Nassau Review Star to the plant in Valley Stream, that is, in Rockville Center—the Nassau Review Star is in Rockville Center,—to the plant in Valley Stream, and then the union men would not have to cross that picket line?" Because it just happens [31] that quite often Mr. Somyak has to employ non-union men, or, if we have men that are sick, he takes men in other categories who are not union men and they do our work also.

So I said, "Under the circumstances, wouldn't it be advisable to take that method?"

Well, for the day—that was the Thursday—they did make arrangements so that I did not have to cross that picket line.

Q. What was done, Mr. Waugh? A. I don't know exactly who brought the papers down.

Q. Whom did you get the papers from or where did you get them? A. I received the papers on the premises in Valley Stream of the Rockaway News Supply Company.

Q. When you said "plant" a minute ago, did you mean the plant of the Rockaway News Supply Company in Valley Stream? A. That is what I meant. So that was Thursday. Then, as soon as I received the Nassau Review Stars, I went on my regular route for the day, which was the Newsdays and the Journals, and so forth.

The next day, which was Friday—

Q. That is Friday, March 3rd? A. March 3rd—I appeared at the office at the same time. I spoke to Mr. Gordon again. I says, "Has there been any arrangements made so that we don't have to cross that picket [32] line?"

So he said, "Well," he said, "I don't know", he said. "We will have to make some arrangements, I guess."

So that day they did make arrangements also to bring the papers down.

Q. What was done that you know of, that you saw? A. Well, I received papers that day from another union man and I asked him had there been any—am I getting ahead of my story? I am sorry, I am a little mixed up.

Q. Just tell us what happened on Friday, the 3rd, with reference to your receiving papers. A. On Friday, the 3rd, I appeared for work and I asked Mr. Gordon if there had been any arrangements made to take the papers down and he said to me—"We have not made any arrangements," so he said, "There's no picket line up there."

So I said, "Well, if there's no picket line up there I will draw the papers, but if there is a picket line up there, Mr. Gordon, I am not going to cross that picket line."

So he said, "Well", he says, "you will have to go up there and draw the papers."

So I said, "I will go up to Rockville Center, but if there

is a picket line, I will not cross the line." So Mr. Gordon and a man named Mr. Lunn, who works in the office—

Q. Do you know how to spell that name? A. L-u-n-n— followed me up in a private car, followed my [33] truck in a private car to Rockville Center. When we arrived at the premises of the Nassau Review Star, there was a picket parading up and down with a sign that Local No. 915 was picketing. So I told Mr. Gordon, I says, "Well, there's the picket. I can't go across the line". "But," I said, "if you want to," I says, "you take my truck, load it with papers and bring it back into the street and I will deliver the papers." And that was procedure as I stated.

Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work.

Q. Mr. Waugh, when did you next work in the regular course of duties after that Friday? A. Saturday morning was my next day of employment, and on Saturday there was no reason why—it wasn't part of my job to draw papers from the Nassau Review Star.

Q. Is that not published on that day? A. It is published on Saturdays.

Q. But your duties normally is not involved— A. My duties normally did not entail me to pick up papers at the plant of the Review Star.

Q. Do you know whether some other routeman picked them up on Saturday? A. I imagine they must.

[34] Q. You don't know? A. I don't know.

Q. All right, sir. Now when did you next work? A. The next day of my employment would be the start of the new week, which was Tuesday, March 7th.

Q. Now, would you state whether you had a conversation with Mr. Gordon on that day? A. When I arrived for work at around 9, 9:15, I asked the Chairman of the Shop—

Q. That is the Union Chairman? A. The Union Chairman of the shop, to go with me to Mr. Gordon's office as I thought possibly I might be in some trouble on account of the picket line.

Q. You just tell us what was said. A. So we went up to Mr. Gordon's office and I asked Mr. Gordon had there been any arrangements so we wouldn't have to cross the picket line. Mr. Gordon said definitely not. He said, "The Management wants you to cross that picket line."

So I said, "Mr. Gordon, I cannot accept that. You will have to say it as an order."

He said, "I order you to cross the Nassau Daily Review Star picket line up there and draw papers."

I said to him, "Or otherwise?"

He says, "Otherwise you are fired; if you refuse, you are fired."

[35] Q. What did you say? A. I said, "Mr. Gordon, I am very sorry", I said. "I will not cross that picket line. So I'm fired."

Q. Is that what you said? A. That is exactly what I said.

* * *

Q. * * * Now, what did you do after your conversation with Mr. Gordon? A. After my conversation with Mr. Gordon, I just left the premises.

Q. Now, thereafter, did you seek employment at the Rockaway [36] News Service? A. Yes, I did.

Q. When? A. I appeared there the following morning and I asked Mr. Gordon if he would hire me, and he said, "You know I can't hire you. You're fired."

So I said, "Well," I said, "I will appear tomorrow morning." So I did appear for approximately three weeks after that every morning and applied for work. Mr. Gordon knew I was there for work. Mr. Gordon told me more than once that he could not hire me.

Q. Now, Mr. Waugh, I ask you whether you participated in any activity for any labor organization on behalf of the employees of the Nassau Daily Review? A. Yes, I did.

Q. When? A. I believe the date was 1946. In 1946 I organized the District Managers of the Nassau Review Star. I brought them to my union and the Executive Council of our union, Newspaper and Mail Deliverers Union, which I am a member of, accepted the bargaining rights of those men. After a considerable length of time, we had an election of that bargaining group and the union lost the election by one vote. I was the man in charge of it—not as an official of the union, of the organization work, I should say—not as an official of the union, but as a member of the union interested in organization [37] work for the benefit of my union.

Q. How long have you been a member of a union, Mr. Waugh? A. I have been a member of the Newspaper and Mail Deliverers Union since 1927.

Q. Will you give your best estimate of the approximate time you customarily spent each day in picking up papers at the Nassau Daily Review Star? A. According to the office orders, I am limited to 30 minutes.

If the paper is not printed and delivered to me in 30 minutes, my orders are to proceed without them. Customarily it takes me anywheres from 5 to 10 minutes of the entire day's work just to pick up that Review Star at that point.

Q. And on those four days a week— A. That is only four days a week.

Miss Humphrey: No further questions, Mr. Examiner.

Trial Examiner Best: You may cross-examine.

CROSS-EXAMINATION:

Q. (By Mr. Kass) Mr. Waugh, on Thursday, when you reported at the shop of Rockaway for your regular job, you testified that the Shop Chairman told you there was a picket line at the Star; is that correct? A. That is quite correct.

Q. What was his name? A. That was Vincent Laplaca.

Q. Now, you then said that you found out from John Byrnes [38] that it was a Typo picket line? A. That's right.

Q. What means did you use to find out from John Byrnes? A. I am quite certain that I called him up. I called him up at his home.

Q. From the plant of Rockaway? A. No, not from the plant of Rockaway. From another place that I had to go. There was no public phone there.

Q. What time did you call John Byrnes? A. Around 9—between 9 and 9:30.

Q. In other words, you left the plant of Rockaway after reporting for work and went out and called John Byrnes; is that correct? A. My time for employment was 9:45.

Q. Will you please answer my question? A. Yes, I did.

* * *

[48] JOHN J. BYRNES: a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Miss Humphrey) * * *

Q. Prior to your present employment, were you ever employed by the Nassau Daily Star Review? A. I was employed by the Nassau Daily Review Star.

[49] Q. The Review Star, thank you. A. For a period of approximately 17 years.

Q. When did your employment there terminate? A. There was a lock-out proclaimed by the Nassau County Typographical Union, No. 915, on November 9, 1947.

Q. Is that the last day on which you worked for the Nassau Daily Review Star? A. Yes.

Q. Are you a member of any labor organization? A. I am a member of the Nassau County Typographical Union No. 915, which is a subordinate union of the International Typographical union.

Q. How long have you been a member of that labor organization? A. About seven years.

Q. Do you hold any office in that organization at the present time? A. At the present time I am Vice President of the Nassau County Typographical Union.

Q. Heretofore, have you held other offices in that organization? A. Yes, a good many.

Mr. Kass: I object to it. It is immaterial.

Miss Humphrey: I think not, Mr. Examiner. I am qualifying the witness to testify on some matters on which there will be objection if he is not qualified.

[50] Trial Examiner Best: Go ahead.

A. I was President of that subordinate union during 1946, 1947 and 1948. I have been in charge of all strike and lockout activities of that union since 194[illegible] to the present time.

Q. Are you familiar with the history of labor relations between the Nassau Daily Review Star and Local No. 915? A. I am.

Q. That is subordinate Union No. 915? A. I am.

Q. Directing your attention to March 2nd, 1950, do you recall having a telephone conversation with Mr. Charles Waugh on that day? A. Yes.

Q. When did it occur? A. Sometime during the morning.

* * *

[55] Q. (By Miss Humphrey) Will you state the substance of the conversation, Mr. Byrnes? A. The substance of the conversation is like this: Mr. Waugh called me, "John, this is Charlie Waugh," he says. "Is that your picket line at the Review Star?"

I said, "Yes, it is."

He said, "Is it on the up-and-up, nothing wildcat about it?"

I said, "No, it is the same old lockout," and he said something like, "That's all I wanted to know," and hung up.

Q. Had, in fact, the picket line been maintained by No. 915 at the Nassau Daily Review Star? A. That was the second day of its maintenance.

Q. And it had been initiated on March 1st, then; is that correct? A. Yes.

Q. At whose direction had that picket line been established, sir? A. At the direction of the union.

J. J. Byrnes, for General Counsel, Direct.

Q. When you say "the Union", you mean No. 915? [56]
A. I mean Nassau County Typographical Union.

Q. Did Local No. 915 ever take any formal action which led to the initiation of that picket line? A. Well, yes. The formal action was the declaration of a lockout at the Review Star on November 9, 1947.

Q. A declaration by whom? A. By the Nassau County Typographical Union.

Q. Did that take any formal form, sir? Was it as a result of a motion or a resolution? A. Oh, yes. It was a formal resolution entered into at a union meeting on that day.

Q. Now, before the initiation of the picketing activity as such—well, let me ask you this question. I withdraw that.

Subsequent to this declaration of lockout which you have referred to, when were pickets first established at this paper? A. The first establishment of the pickets at the Nassau Daily Review Star was on March 1, 1950.

Q. Now when was the declaration of lockout, sir? A. November 9, 1947.

Q. Now, between November 9, 1947, and March 1, 1950, did 915 ever take any formal action which led to the initiation of the picket line? A. Well, I would say the motivating action which led to the [57] establishment of the picket line at that time was a resolution introduced at a union meeting in June.

Q. In June of what year, sir? A. 1949, moving that the lockout—

Mr. Kass: I object to the contents of the resolution.

Q. Do you have a copy of the resolution with you, sir? A. I have.

Q. Will you produce it? A. Yes.

Miss Humphrey: May we have a minute, off the record, sir?

Trial Examiner Best: Yes. Off the record.

(Discussion off the record.)

Trial Examiner Best: On the record.

Q. (By Miss Humphrey) Mr. Byrnes, I understand that you have in your possession a copy of the resolution of Local 915 to which you have referred orally? A. I have.

Q. Will you read it into the record, if you please, sir?

Trial Examiner Best: How long is that?

Miss Humphrey: It is not long, Mr. Examiner.

The Witness: It is a paragraph.

A. "Motion was regularly made and seconded that the lockout activities at the Review Star and at Griscom's be be renewed and revitalized by the officers of the Union. Motion carried. Breinlinger appointed Mr. Byrnes to carry out the Union's [58] decision in this motion."

Q. That was carried? A. That was carried.

Q. On what date? A. At a regular meeting on June 27, 1949.

Q. And yet no action was taken pursuant to that in maintaining a picket line? A. No, in maintaining a picket line, no.

Q. Was other action taken pursuant to that resolution prior thereto? A. Yes, other publicity activities—

Mr. Kass: I object to it.

Miss Humphrey: All right, I will withdraw it.

Q. (By Miss Humphrey) Now, how long has that picket line been maintained? A. To the present date. It is still being maintained.

* * *

[65] Q. Did your union ever engage in negotiations with the Nassau Review Corporation since the date of that decision? A. Yes, on many occasions.

Q. You, as Vice President, are familiar with those negotiations? A. I am.

Q. To your knowledge, has the Nassau Review Corporation ever questioned the majority of the International Typographical Union, No. 915, as representative of its employees in the unit set forth in that decision? A. They never have questioned our majority.

* * *

[68] Q. (By Miss Humphrey) Mr. Byrnes, I ask you whether subsequent to the discharge of Mr. Waugh any picket signs were ever displayed by Subordinate Union No. 915, which referred to Mr. Waugh? [69] A. Yes.

Q. Where were those picket signs maintained? A. At the picket line in front of the Nassau Daily Review Star.

Q. When were they maintained? A. I would say they were maintained on March 8th and 9th.

Q. Give us the substance of what they said. A. The exact wording of the signs was this: "Is Waugh the only union mail deliverer?"

Miss Humphrey: No further questions.

CROSS EXAMINATION:

Q. (By Mr. Kass) Now, Mr. Byrnes, what was the reason for those picket signs? A. Well, the action of the Mail Deliverers crossing our picket line was doing the morale of my own union no good.

Q. In other words, all of the mail deliverers— A. I hadn't finished my answer.

Q. Excuse me. A. It also was demonstrating the ineffectiveness of our picket line.

* * *

[70] Mr. Kass: The succeeding question is: In other words, all of the other drivers were crossing the picket line; is that right?

Mr. Waldman: I object to that question.

Trial Examiner Best: I think under the circumstances he is entitled to answer, in explanation of the sign.

A. I don't know that all the other union drivers were crossing. I don't know which of them were union and which of them were non union. I do know that some of them who were union were crossing.

Q. The Rockaway trucks were crossing the picket line; is that correct? [71] A. That is true.

* * *

[73] Q. And at the time you ordered the signs prepared, the only union mail deliverer that you knew that was not crossing was Mr. Waugh; is that correct? A. That is true.

* * *

[95] Trial Examiner Best: All right. In view of the previous ruling about the motion made by the General Counsel to dismiss the additional defense, the Trial Examiner will admit the introduction of the original contract, with the agreement of the General Counsel that photostatic copies may be substituted and the original withdrawn. The General Counsel may have an exception noted to the contract, on her objection to its materiality.

Mr. Kass: May the exhibit be marked, sir?

Trial Examiner Best: The exhibit may be identified and received in evidence.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification and received in evidence.)

* * *

J. Somyak, for Respondent, Direct.
General Counsel's Exhibit 2.

[99] JOHN SOMYAK a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination:

Q. (By Mr. Kass) * * *

[101] Q. And can you tell us what other papers you are the distributor for? A. Practically all the English language papers and also the foreign papers.

Q. Can you name them, sir? A. Well, the New York Times, the Herald-Tribune, Daily News, the Daily News Portion of Long Island, the Mirror, the American, Journal-American, Telegram, the Sun, the World-Telegram, the Evening Post, Nassau Review, the Long Island Daily—the Newsday, and all the foreign papers. I can't enumerate those.

General Counsel's Exhibit 2.

STIPULATION ON COMMERCE

The following facts are stipulated and agreed by and between the undersigned and this Stipulation may be introduced and received in evidence in a hearing to be conducted by the National Labor Relations Board with the same force and effect as if properly qualified witnesses were called before the National Labor Relations Board and gave under oath sufficient and competent evidence as to each of the facts set forth, without prejudice to the right of the National Labor Relations Board or any party here-

General Counsel's Exhibit 2.

to to offer oral testimony or evidence as to any matter relevant to the issues in this proceeding:

1. Rockaway News Supply Company, hereinafter referred to as Respondent, is a corporation duly organized under and existing by virtue of the laws of the State of New York.

2. At all times mentioned herein Respondent has maintained its principal office and place of business at 518 Rockaway Avenue, Valley Stream, Nassau County, New York and a place of business at 45-35—36th Street, Long Island City, Queens County, New York where it has been continuously engaged in the purchase, sale, distribution and delivery of newspapers, magazines and periodicals including the New York Times, the New York Herald Tribune, the Daily News and the Daily Mirror to various stores, newsdealers and other retail distributors at various locations in the State of New York.

3. The publisher of each of the publications named in paragraph 2 above has used and continues to use one or more of the wire services known as the Associated Press, the United Press, and the International News Service; each of such publishers has, during the past year, caused to be shipped in interstate commerce from its respective New York plant to states of the United States other than the State of New York newspapers valued at in excess of $25,000; and each such publisher is an instrumentality and channel of interstate commerce.

4. During the past year Respondent, in the course and conduct of the operations described in paragraph 2 above, performed services valued at in excess of $50,000 in the distribution of the publications named therein.

Excerpts from Respondent's Exhibit 1.

Respondent concedes that it is engaged in interstate commerce within the meaning of the National Labor Relations Act.

Dated: New York, New York November 9, 1950.

ROCKAWAY NEWS SUPPLY COMPANY, INC.

By JULIUS KASS, Atty.

HELEN F. HUMPHREY
Helen F. Humphrey
Counsel for the General Counsel
National Labor Relations Board
Second Region
2 Park Avenue
New York 16, New York

Excerpts from Respondent's Exhibit 1.

AGREEMENT made this 25th day of October, 1948, by and between ROCKAWAY NEWS SUPPLY COMPANY, INC., hereinafter called the "Employer" and NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, hereinafter called the "Union" for and in behalf of the Union.

WITNESSETH:

That in consideration of the mutual promises exchanged herein, the parties hereto agree as follows:

SECTION 1

1-a. Subject to the provisions hereinafter set forth, the Employer recognizes the Union as the exclusive represen-

tative for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men.

* * *

SECTION 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

SECTION 3

Mutual Guarantees

* * *

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any

provision of this agreement; at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

* * *

SECTION 19

19-a. There is hereby created an Adjustment Board to function with the powers and duties herein conferred during the term hereof.

* * *

19-d. In addition to all the matters herein expressly provided for which may be submitted to the Adjustment Board, such Board shall have the power to hear and determine all questions that may arise with respect to the interpretation or application of any of the provisions hereof or with respect to any of the relations between the Union or any of its members and the Employer, or with respect to any other thing germane to the subject matter hereof and the purposes thereof though not expressly provided for or dealt with herein.

* * *

19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board.

* * *

BATAVIA TIMES PUBLISHING CO., BATAVIA, N. Y.
12-21-51-75

In the United States Court of Appeals for the Second Circuit

No. 208

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC., RESPONDENT

Answer to petitioner for enforcement of an order by the National Labor Relations Board

January 17, 1952

To the Honorable, the Justices of the United States Court of Appeals for the Second Circuit:

Rockaway News Supply Company, Inc., respectfully answers the petition for enforcement submitted in the above matter by the National Labor Relations Board on the 15th day of January 1952.

The respondent respectfully admits all of the allegations of the petition except that it denies that it committed any unfair labor practice as stated in the petition, Paragraph "1," and in the order recited under Paragraph "2," and, therefore, states that this Court must deny enforcement of the said order and further respectfully shows:

1. That the National Labor Relations Board was at all times relevant to the proceedings hereto and still is without jurisdiction to have issued the complaint herein by virtue of the fact that the alleged violation was a grievance under the existing collective bargaining agreement which was arbitrated by the charging
64 party and the respondent in conformance with the provisions of the collective bargaining agreement and that the discharge of the charging party was for cause.

Wherefore, the respondent prays this Honorable Court that they cause notice of the filing of this answer and a copy thereof to be served upon the petitioner and that it deny enforcement of the order set forth in Paragraph "2" of the petition in its entirety and for such other and further relief as to the Court may seem just and equitable in the premises.

Dated New York, N. Y., January 17, 1952.

ROCKAWAY NEWS SUPPLY COMPANY, INC.,
By BANDLER, HAAS & KASS,
By JULIUS KASS, A PARTNER,
BANDLER, HAAS & KASS,
Attorneys for Respondent.

232642—52—2

65 Before the National Labor Relations Board, Second Region

Case No. 2-CA-1342

IN THE MATTER OF ROCKAWAY NEWS SUPPLY COMPANY, INC. AND CHARLES WAUGH

65 *Testimony*

270 BROADWAY,
NEW YORK, NEW YORK,
Friday, December 1, 1950.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a. m.

Before LEE A. BEST, Trial Examiner.

Appearances

Helen F. Humphrey, Counsel for the General Counsel, National Labor Relations Board. Hyman Waldman, Esq., 305 Broadway, New York, New York, appearing on behalf of the Charging Party. Bandler, Haas & Kass, 11 Broadway, New York, New York, appearing on behalf of the Respondent. By Julius Kass, Esq., of Counsel.

66 [23] CHARLIE M. WAUGH, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * * *

[29] A. I had found out, when I appeared for work at 9 o'clock—I generally get there a little early—when I appeared for work at 9 o'clock, the Shop Chairman had informed me that there was a picket line in front of the Nassau Review Star.

Q. When you say "Shop Chairman" what do you mean?—A. He is the Chairman, the Union Chairman.

Q. What union is that, sir?—A. The Newspaper and Mail Deliverers Union.

Q. Very well.—A. He had informed me that there was a picket line in front of the Nassau Review Star. So I immediately made inquiries [30] to find out whose picket line it was, and I was informed by Mr. Byrnes, who, to my knowledge, is a member of Local No. 915, International Typographical Union——

Q. Is that Mr. John Byrnes?—A. Mr. John Byrnes—that there was a picket line, and that being familiar with the Nassau Review labor troubles, I knew that—I asked him if it was a continuation of the same trouble that they had before. He informed me that it was, so, then, I immediately informed Mr. Gordon that under the

circumstances, that it was my estimation it was a legal picket line, that I, as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker. So Mr. Gordon told me that, "Charlie," he said, "I wouldn't take that attitude. It might mean your job." I said, "Mr. Gordon, if it means my job, I still have to maintain my right as a union man that I cannot harm another union, especially when they hold a legal picket line, which I know they do."

67 So after arguing pro and con on it, I said to him, "Why can't you go to your employer, Mr. Somyak, and ask him if he couldn't get papers delivered from the Nassau Review Star to the plant in Valley Stream, that is, in Rockville Center—the Nassau Review Star is in Rockville Center—to the plant in Valley Stream, and then the union men would not have to cross that picket line?" Because it just happens [31] that quite often Mr. Somyak has to employ nonunion men, or, if we have men that are sick, he takes men in other categories who are not union men and they do our work also.

* * * * *

A. That is what I meant. So that was Thursday. Then, as soon as I received the Nassau Review Stars, I went on my regular route for the day, which was the Newsdays and the Journals, and so forth.

The next day, which was Friday——

Q. That is Friday, March 3rd?—A. March 3rd—I appeared at the office at the same time. I spoke to Mr. Gordon again. I says, "Has there been any arrangements made so that we don't have to cross that picket [32] line?"

So he said, "Well," he said, "I don't know," he said. "We will have to make some arrangements, I guess."

So that day they did make arrangements also to bring the papers down.

Q. What was done that you know of, that you saw?—A. Well, I received papers that day from another union man and I asked him had there been any—am I getting ahead of my story? I am sorry, I am a little mixed up.

Q. Just tell us what happened on Friday, the 3rd, with reference to your receiving papers.—A. On Friday, the 3rd, I appeared for work and I asked Mr. Gordon if there had been any arrangements made to take the papers down and he said to me—"We have not made any arrangements," so he said, "There's no picket line up there."

68 So I said, "Well, if there's no picket line up there, I will draw the papers, but if there is a picket line up there, Mr. Gordon, I am not going to cross that picket line."

So he said, "Well," he says, "you will have to go up there and draw the papers."

So I said, "I will go up to Rockville Center, but if there is a picket line, I will not cross the line." So Mr. Gordon and a man named Mr. Lunn, who works in the office——

Q. Do you know how to spell that name?—A. L-u-n-n followed me up in a private car, followed my [33] truck in a private car to Rockville Center. When we arrived at the premises of the Nassau Review Star, there was a picket parading up and down with a sign that Local No. 915 was picketing. So I told Mr. Gordon, I says, "Well, there's the picket. I can't go across the line." "But," I said, "if you want to," I says, you take my truck, load it with papers and bring it back into the street and I will deliver the papers." And that was the procedure as I stated.

Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work.

* * * * *

Q. Do you know whether some other routeman picked them up on Saturday?—A. I imagine they must.

* * * * *

[34] So we went up to Mr. Gordon's office and I asked Mr. Gordon had there been any arrangements so we wouldn't have to cross the picket line. Mr. Gordon said definitely not. He said, "The Management wants you to cross that picket line."

So I said, "Mr. Gordon, I cannot accept that. You will have to say it as an order."

He said, "I order you to cross the Nassau Daily Review Star picket line up there and draw papers."

69 I said to him, "Or otherwise?"

He says, "Otherwise you are fired; if you refuse, you are fired." [35]

Q. What did you say?—A. I said, "Mr. Gordon, I am very sorry," I said. "I will not cross that picket line. So I'm fired."

Q. Is that what you said?—A. That is exactly what I said.

* * * * *

[37] CROSS-EXAMINATION

* * * * *

[40] Q. Well, now, were there any other men also assigned to the job of getting papers from the Nassau Star Review?—A. Yes; there were.

Q. How many other men were doing work similar to yours?—A. I was the only one doing that type of work.

Q. How many other men were supposed to go to the Nassau Star Review that day to pick up papers?—A. Five men.

Q. In addition to yourself?—A. I believe it is five in addition to myself.

Q. And were those five men union men?—A. Yes; they were union men.

Q. And to your knowledge, did those five men do their job?

* * * * *

[42] Q. The papers were brought out to you for delivery to the customers?—A. That's right.

Q. Who brought them out to you?—A. I don't quite remember.

Q. Was it Mr. Gordon?—A. On Friday, it was Mr. Gordon.

Q. On Thursday, who was it?—A. I said I don't remember.

70 Q. And you made delivery of those papers?—A. Correct.

Q. So that actually you did not object to delivering papers from a strike-bound plant; is that correct?—A. No.

Q. You only objected to your crossing the picket line?—A. Exactly.

* * * * *

[43] Q. But you did not object to delivering papers that were given to you by another union man who had crossed the picket line?—A. No.

* * * * *

[48] JOHN J. BYRNES, a witness called by and on behalf of the General Counsel for the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

[58] A. A day or so after I learned of Mr. Waugh's discharge, at my direction, picket signs were printed carrying the following [59] legend——

"Mr. KASS. I object to the testimony and move that it be stricken."

* * * * *

[63] I offer to prove by this witness, if he were permitted to answer the question directed to him, that he would testify that beginning on March 10th, and for approximately two days thereafter, picket signs were carried before the Nassau Daily Star Review which read, "Is Waugh the only union mail deliverer?" or words to that effect. That is my offer of proof, Mr. Examiner.

* * * * *

71 By Miss HUMPHREY:

[68] Q. Mr. Byrnes, I ask you whether subsequent to the discharge of Mr. Waugh any picket signs were ever displayed by Subordinate Union No. 915, which referred to Mr. Waugh? [69]—A. Yes.

Q. Where were those picket signs maintained?—A. At the picket line in front of the Nassau Daily Review Star.

Q. When were they maintained?—A. I would say they were maintained on March 8th and 9th.

Q. Give us the substance of what they said.—A. The exact wording of the signs was this: "Is Waugh the only union mail deliverer?"

* * * * * *

CROSS-EXAMINATION

* * * * * *

Q. In other words, all of the mail deliverers' drivers were crossing the picket line?

—Mr. WALDMAN. I object to that.

Q. (Continuing.) With the exception of Mr. Waugh.

* * * * * *

[70] Trial Examiner BEST. Why don't you just ask the witness what their reasons for having those picket signs were with Waugh's name on them?

Mr. KASS. I have already asked that and now I am entitled to ask the succeeding question.

Trial Examiner BEST. What is the succeeding question?

Mr. KASS. The succeeding question is: In other words, all of the other drivers were crossing the picket line; is that right?

* * * * * *

A. I don't know that all of the other union drivers were crossing. I don't know which of them were union and
72 which of them were nonunion. I do know that some of them who were union were crossing.

Q. The Rockaway trucks were crossing the picket line; is that correct? [71]—A. That is true.

Q. And to your knowledge, the only mail deliverers union driver who wasn't crossing was Waugh.

* * * * * *

[73] Q. And at the time you ordered the signs prepared the only union mail deliverer that you knew that was not crossing was Mr. Waugh; is that correct—A. That is true.

* * * * * *

[94] Mr. KASS: Mr. Examiner, I now offer into evidence the contract between Rockaway News Supply Company, Inc., and Newspaper and Mail Deliverers Union of New York and Vicinity, dated the 25th of October 1948, the contract currently in effect between the collective bargaining agency and the Respondent; for the purpose of saving cost, I would like to request permission of the attorney for the General Counsel to read into the record the pertinent provisions of the contract rather than introduce the entire contract itself.

* * * * * *

[96] Mr. KASS. (Reading.) "The undersigned, constituting the members of the Board of Adjustment, designated in accordance with the agreement between the parties, having [97] heard the proof and allegations, award as follows: Under Section 4 of the agreement between the parties, it is the obligation of an employee to comply with orders of the foreman, and if such orders are objectionable to him personally, to have the issues discussed and brought to arbitration in accordance with the procedure set forth therein. He may not, in the first instance, refuse to obey the order merely because it is personally distasteful to him, unless it is the type of order which might subject him to physical danger or be contrary to public policy.

"Of course, the order which the employee here refused to obey cannot be held to have been against public policy (and concededly it does not physically endanger him) particularly since the union had knowingly refrained from taking any position and the act required was willingly performed without objection by six other employees who were members of the union. In addition, the contract between the parties does not specifically permit the refusal by the employee to comply with such an order although other contracts in the industry do contain such a provision.

"Consequently it must be ruled that the act of Charles Waugh in refusing to obey the order of the foreman on March 7, 1950, constituted just cause for discharge. Signed, I. Robert Feinberg, Impartial Chairman; John Somyak, John Fylstra." [98]

Thereunder is stated "The members of the Adjustment Board designated by the Union dissent from this award, dated, New York, New York, March 31, 1950."

* * * * * *

[99] JOHN SOMYAK, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

* * * * * *

DIRECT EXAMINATION

* * * * *

[102] Q. One moment, now. With reference to that negotiation do you recall any demand made by the union with reference to the question of work stoppages and the right of people to refuse to cross a picket line?

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Miss HUMPHREY. Objection, Mr. Examiner.

Mr. WALDMAN. I join in the objection.

Trial Examiner BEST. Objection sustained. The contract speaks for itself.

Mr. KASS. At this time, sir, we offer to prove that during the course of this negotiation, one of the demands made by the union was a clause in the contract with reference to work stoppages which would have said, "No man shall be required to cross a picket line," and that during the course of these negotiations that clause was rejected by the respondent and the union thereby acquiesced in the rejection of that clause and consented to the no strike clause contained in Respondent's Exhibit 1.

Trial Examiner BEST. All right. Let the offer of proof appear in the record.

* * * * *

[103] CROSS-EXAMINATION

* * * * *

[105] Mr. KASS. I object to it on the ground that that is not the best evidence of the invocation of the proceedings which resulted in the arbitration proceeding, and I offer to stipulate on behalf of the respondent that by virtue of a letter dated March 16, 1950, from Samuel Duker, attorney for the union, addressed to I. Robert Feinberg, Esq., 25 West 44th Street, New York, New York, as follows:

"DEAR MR. FEINBERG. The Newspaper and Mail Deliverers' Union hereby files a grievance against the Rockaway News Supply Company, Inc., by reason of the unlawful discharge of one Charles Waugh, an employee and member of the union. Reinstatement with back pay are hereby requested. The union waives a hearing by the Four-man Board and requests a hearing by the Five-man Board. Very truly yours, Samuel Duker."

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* * * * *

[107] Q. Do you know, sir, whether or not in this particular case the union initiated this arbitration? Do you know it?—A. I think they did. [108]

Q. So that when you said, "I don't know," you withdraw your answer that you don't know and now you say that the union did initiate this arbitration?—A. That letter refreshes my memory.

* * * * *

Respondent's exhibit No. 1.

19–e. Any matter which may come before the Adjustment Board, as herein provided, shall be deemed automatically to have been submitted to the Board with full power in the Board to act thereon forty-eight hours (Sunday and Legal Holidays excepted) after the same has arisen, unless satisfactorily adjusted within that time between the Union and the Employer, or unless such time shall have been extended in writing by the Impartial Chairman.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 208

Argued April 10, 1952. Decided May 12, 1952

Docket No. 22252

NATIONAL LABOR RELATIONS BOARD, PETITIONER

against

ROCKAWAY NEWS SUPPLY CO., INC., RESPONDENT

Before: CHASE, MARIS and CLARK, *Circuit Judges*

On Petition for Enforcement of an Order of the National Labor Relations Board

George J. Bott, General Counsel, *David P. Findling*, Associate General Counsel, *A. Norman Somers*, Assistant General Counsel, *Frederick U. Reel*, and *Marvin E. Frankel*, Attorneys, National Labor Relations Board, for Petitioner.

Bandler, Haas & Kass, for Respondent.

MARIS, *Circuit Judge:*

This is a petition to enforce an order of the National Labor Relations Board. The Board found that respondent, Rockaway News Supply Co., Inc., had violated Sections 8(a)(1) and (3) of the National Labor Relations Act by discharging an employee because of his refusal to cross a picket line at a plant which his duties required him to enter. The undisputed facts upon which this finding is based may be summarized as follows:

Charles Waugh, the employee whose discharge on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years. He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees. Working five days a week (Tuesdays through Saturdays), from 9:45 a.m. to 6:30 p.m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications. Among his scheduled stops was one at the plant of The Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily

Review Star. Before 10:30 a.m. on each working day, except Saturday, Waugh was required to pick up a supply of Review Stars for delivery at subsequent points on his route. This operation consumed about 10 or 15 minutes of each day.

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of The Daily Review Corporation. He then went to his foreman and told him that he, as a union man, would not cross that union picket line and thereby become a "scab" or a strikebreaker. The foreman suggested that he should not take that attitude, it might mean his job. But Waugh reiterated his position and suggested that copies of the Review Star be brought out to him in some way which would not entail his crossing the picket lines.

Respondent arranged to have its consignment of Review Stars brought out on that day to its plant at Valley Stream, from which point Waugh took them and proceeded on his route as usual. Again on the next day, Friday, March 3, respondent had the papers brought by another of its employees to Waugh outside the picket line. On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, his foreman told him that arrangements like those of the preceding Thursday and Friday would not be made and that respondent expected him to cross the picket line. "Otherwise," said the foreman, "you are fired; if you refuse, you are fired." Persisting in his refusal to cross the picket line, Waugh left respondent's premises. On the following day, Waugh returned seeking to be rehired but the foreman told him that he couldn't hire him, he had been fired. On each succeeding day for about three weeks Waugh appeared at the respondent's plant but was not rehired.

On April 7, 1950 Waugh filed a charge and on November 8, 1950 the General Counsel of the Board issued a complaint against the respondent. After a hearing before a trial examiner and an intermediate report by him the Board filed its decision holding that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line and that accordingly his discharge was in violation of Sections 8(a)(1) and (3) of the Act. Accordingly the Board entered an order which required respondent to cease and desist from (1) interfering with, restraining, or coercing its employees in the exercise of their right to assist the Typographical Union, or any other labor organization, and their right to engage in, or refrain from, other concerted activities and (2) discouraging activity on behalf of and membership in the Typographical Union or any other labor organization, by discriminating in regard to the hire or tenure of its employees. Affirmatively, the order required respondent to reinstate Waugh with back pay, to make available to the

Board necessary records bearing on Waugh's right to reinstatement and back pay, and to post appropriate notices. 95 N. L. R. B.

It will thus be seen that this case squarely presents the question whether it is an unfair labor practice for an employer to discharge an employee who refuses to obey the employer's orders to perform that part of his regular daily duties which involve his crossing the picket line of another union than his own at another plant than that of his employer. In considering this question we accept the contention of the Board that the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of "the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection," which is expressly guaranteed by Section 7 of the Act. Such refusal to cross a picket line is habitual with union workers as this court has recently pointed out,[1] it is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense directed to mutual aid or protection.[2] But accepting the proposition that the refusal of an employee to cross a picket line is a right guaranteed by Section 7 of the Act does not answer the question which this case poses. For, as the Supreme Court pointed out in *Republic Aviation Corp.* v. *Board*, 1945, 324 U. S. 793, 798:

> "Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee."

It was in recognition of this limitation upon the rights guaranteed by Section 7 that the Board itself in its decision in *Peyton Packing Company, Inc.*, 1943, 49 N. L. R. B. 828, 843, said:

> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose."

It is true that in the *Peyton Packing Company* case the Board found that the union solicitation for which the employees were dis-

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[1] *National Labor Rel. Bd.* v. *Service Trade Chauffeurs, etc.*, 2 Cir., 1951, 191 F. 2d 65, 68.

[2] *National Labor Rel. Bd.* v. *Peter C. K. Swiss Choc. Co.*, 2 Cir., 1942, 130 F. 2d 503, 505-506.

charged, although occurring on the company's premises, had taken place on the employee's time before or after work or during luncheon or rest periods and not during their working time. It accordingly held their discharges to be in violation of Section 8(1) of the Act. The distinction which the Board has thus made between an employee's activities on his own time, even though on his employer's premises, and his activities during his actual working time is a sound and reasonable one and has been upheld by the courts.[3]

In the cases to which we have referred the distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time was applied to the soliciting of union memberships in the plant. The right to assist a union of which one is not a member by refusing to cross its picket line is certainly of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member in concerted activities which will directly protect or aid in promoting their common interests. We think that the former is subject to the same limitations as the latter. In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line.[4] To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do.[5]

The Board in its decision in this case stated:

> "Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent."

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[3] *Republic Aviation Corp.* v. *Board*; 1945, 324, U. S. 793, 803; *National Labor Relations Bd.* v. *Illinois Tool Works*, 7 Cir. 1946, 153 F. 2d 811, 814.

[4] We do not have here a case in which the order to cross the picket line was a discriminatory order enforced against a union employee in order to prejudice him by reason of his union membership. Such a situation would, of course, involve other considerations.

[5] *C. G. Conn, Limited* v. *National Labor Relations Board*, 7 Cir., 1939, 108 F. 2d 390, 397; *National Labor Relations Bd.* v. *Montgomery Ward & Co.*, 8 Cir., 1946, 157 F. 2d 486, 496; *National Lab. Rel. B.* v. *Kopman Woracek Shoe Mfg. Co.*, 8 Cir., 1947, 158 F. 2d 103, 108.

It will be noted that the Board here concedes that the Respondent could have required Waugh to cross the picket line or "vacate his job." But by vacating his job the Board seems to mean going out on strike rather than resigning. We cannot follow the Board's reasoning. For Waugh had no grievance against the respondent nor any economic demands against it which a strike on his part might have enforced. On the contrary, if he had gone on strike it could only have been to assist the striking members of the Typographical Union at the Daily Review Corporation plant by seeking to force his employer not to deal with that corporation. If Waugh's union had supported him in such a strike it would have been a secondary strike and as such would have been an unfair labor practice on the part of the union, under Section 8(b)(4) [6] of the Act as amended by the Taft-Hartley Act.

It is true, as the Board points out, that by virtue of the proviso to Section 8(b)(4) Waugh's individual refusal to cross the picket line

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[6] "Sec. 8(a) * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees per-

cannot be regarded as a violation of the Act or as convicting his union of an unfair labor practice. But the fact remains that the strike which the Board suggests the respondent could, and we gather it thinks, should have compelled Waugh to undertake would have been an unlawful one if he had gotten any support in it from his own union. And the fact that Waugh's act in refusing to perform that part of his duties which involved crossing the picket line was not a violation of the National Labor Relations Act does not make it any the less a violation of his obligation to his employer to perform the duties of his employment or any the less a proper basis for his discharge for failure to do so.

We think that the Board is wholly unrealistic in the distinction which it seeks to make between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker after he had been compelled to vacate his job for refusing to do so, which it thinks would have been perfectly all right. For once Waugh had gone out on his one-man strike against the respondent his place could unquestionably have been filled and his name could then have been dropped from the respondent's payroll under settled principles of law applicable to the replacement of strikers engaged in a strike not involving unfair labor practices.[7] Moreover it is inconceivable that Waugh could have won his strike in view of the fact, already adverted to, that any assistance to him by any union would under Section 8(b)(4) have been an unfair labor practice which it would have been the duty of the Board to prevent.

We need only add that we have assumed in reaching our conclusion in this case that Waugh's refusal to cross the Typographical Union's picket line was intended by him to aid that labor organization. On the evidence in this case that fact is very doubtful, however. For the evidence indicating that Waugh's only concern appeared to be with his own standing as a union man. He stated that he did not want to become known as a "scab" or strike breaker by crossing a picket line. He had no intention to aid the picketing union by refusing to handle the newspapers which were

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forming such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

[7] *Labor Board* v. *Mackay Co.*, 1938, 304 U. S. 333, 345-346; *National Labor Relations Board* v. *Remington Rand, Inc.*, 2 Cir., 1942, 130 F. 2d 919, 928; *National Labor Relations Board* v. *Globe Wireless*, 9 Cir., 1951, 193 F. 2d 748, 750.

being produced in the picketed plant. On the contrary it is undisputed that he readily handled and distributed these newspapers on the two days when they were brought to him across the picket line by a fellow employee who apparently did not have the same compunctions.

We conclude that the respondent was not guilty of an unfair labor practice in discharging Waugh. We are supported in this conclusion by the decision of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board* v. *Illinois Bell Tel. Co.*, 1951, 189 F. 2d 124, cert. den. 342 U. S. 885, in which that court reached the same result upon substantially similar facts. Since Waugh's discharge was the sole basis for the Board's conclusions and order it follows that the order must be denied enforcement and set aside.

The petition of the National Labor Relations Board for the enforcement of its order will be denied and the order will be set aside.

CLARK, *Circuit Judge* (dissenting):

While the Taft-Hartley Act reversed the trend toward unionism fostered by the Wagner Act, it did so by bringing the employer also within the aegis of administrative agency protection, and not by reversion to *laissez faire*. So Congress expressly preserved much of the former statutory protections of the unions, such as the right to strike, §7, 29 U. S. C. A. §157. And when it limited the weapon of the boycott it took plains to except from the newly defined unfair labor practices of a union or its agents the crossing of a picket line. Sec. 8(b)(4), 29 U. S. C. A. §158(b)(4), final sentence, as quoted in note 6 of the opinion. The adoption of this Act was bitterly contested, as is well known; its provisions therefore should be taken as representing the utmost position for which either side could muster sufficient support to obtain the final legislative endorsement. There is thus less reason than usual to extend the prohibitions of the Act by implication. *Rabouin* v. *N. L. R. B.*, 2 Cir., March 24, 1952.

When, therefore, the Board acts in what seems to me the intended spirit of this specific §8(b)(4) exception to hold that a union member does not lose the statutory protection by refusing to cross a picket line, I do not see how we can rule that action erroneous as a matter law. Note that here we are not faced with the question whether or not the Board could have found some violation in all the circumstances; on the contrary we are holding it under legal compulsion so to find. The extent of the step we are taking in thus promulgating a rigid rule of law is highlighted by the authorities relied on. An abstract statement of rights as offset by duties, made by the Supreme Court in 1945, *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798, 157 A. L. R. 1081, and a tentative—but not enforced—suggestion of the Board in 1943 that an employer might make and enforce "a rule prohibiting union solicitation during working hours," *Peyton*

Packing Co., Inc., 49 N. L. R. B. 828, 843, are employed to restrict this explicit and unlimited exception of the 1947 Act to *only non-working hours*. To say that a workman is protected from discharge for refusing to cross a picket line only when his refusal is outside of his working hours—here from 9:45 a. m. to 6:30 p. m.—seems to me a practical nullification of the statutory provision. That, by the way, was not discussed in *N. L. R. B.* v. *Illinois Bell Tel. Co.*, 7 Cir., 189 F. 2d 124, *supra*, because the situation there arose before the enactment of the Taft-Hartley Act.

The opinion does not rely at all on any suggestion that Waugh was violating a service contract; that issue, I believe, has thus been properly removed from the case.[1] But with that eliminated, all that is left to support the conclusion negating the statutory exception is, it seems to me, an argument that any prohibition against discharge is unreal in view of the settled right in the employer in an "economic" or competitively justified strike to keep his business going by replacing the strikers. If unreal in this case, it must be considered equally so in all cases of economic strikes. But for good or ill, the distinction is quite settled, not newly developed here, and, following its history beginning with *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346, seems quite natural. It was applied by us in *N. L. R. B.* v. *Remington Rand, Inc.*, 2 Cir., 130 F. 2d 919, 928, and is explained succinctly and clearly in *N. L. R. B.* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750.

Accordingly I can see no legal basis for refusing enforcement of this Board order.

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[1] Although the employer here strongly contended that a collective bargaining contract with the union so required, the Board had ruled the entire contract void because of an illegal union-security clause and, apparently, other defects. A test case on this issue is said to be pending on our calendar; but see *Red Star Express Lines of Auburn, Inc.* v. *N. L. R. B.*, 2 Cir., April 14, 1952, where the Board was sustained in such a view of a union-security contract.

United States Court of Appeals, Second Circuit. Filed Aug. 8, 1952. Alexander M. Bell, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 208

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC., RESPONDENT

DECREE

Before: CHASE, MARIS, and CLARK, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated July 20, 1951. The Court heard argument of respective counsel on April 10, 1952, and has considered the briefs and the transcript of record filed in this cause. On May 12, 1952, the Court, being fully advised in the premises, handed down its decision denying enforcement of the Board's order and setting it aside. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board dated July 20, 1951, directed against Rockaway News Supply Company, Inc., be and it hereby is set aside.

HARRIE B. CHASE,
Judge, United States Court of Appeals for the Second Circuit.
ALBERT B. MARIS,
Judge, United States Court of Appeals for the Second Circuit.

Filed: August 8, 1952.
A true copy,
[SEAL.]

ALEXANDER M. BELL,
Clerk.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing: Vol. I. pp. 1-61 & Vol. II. pp. 1-27, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case of National Labor Rela-

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tions Board, Petitioner, against Rockaway News Supply Company, Inc., Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this — day of August in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the said United States the one hundred and seventy-seventh.

[SEAL.]

ALEXANDER M. BELL,
Clerk.

87 Supreme Court of the United States

No. —, October Term, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY COMPANY, INC.

Order extending time to file petition for writ of certiorari

Filed August 1, 1952

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 9th, 1952.

[File endorsement omitted.]

TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of August 1952.

89 Supreme Court of the United States

No. 318, October Term, 1952

[Title omitted.]

Order allowing certiorari

Filed October 27, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT, U.S.
No. 518

SEP 5 - 1952

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on May 12, 1952 (R.A. 15-21, 23),[1] denying enforcement of an order issued by the Board against Rockaway News Supply Co., Inc. (B.A. 10-14).

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R.A. 15-21, 21-22) are reported

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[1] For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the court below, herein designated "R.A.," and the appendix to the Board's brief in the court below, designated "B.A." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief.

at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 7-36) are reported at 95 NLRB 336.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1952 (R.A. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are sent forth in the Appendix, *infra,* pp. 26-30.

STATEMENT

1. *The facts*

Upon the usual proceedings under Section 10 of the Act, the Board, on July 20, 1951, issued its findings of fact, conclusions of law, and order (B. A. 7-36). The facts, which are not in dispute, may be summarized as follows:

Charles Waugh, the employee whose discharge

on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years (B. A. 19; 40).[2] He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees (B. A. 19; 49, 56-60).

Working five days a week (Tuesday through Saturday), from 9:45 a.m. to 6:30 p. m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications (B.A. 20; 42-43). Among his scheduled stops was one at the plant of the Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily Review Star. Before 10:30 a.m. on each of his working days except Saturday, Waugh was required to make this stop to pick up a supply of Review Stars for delivery at subsequent points on his route (B.A. 20; 42, 43, 47). This operation consumed about 10 minutes of each working day on which it was required (B.A. 20; 49).

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of the Daily Review

[2] Where a semicolon appears in a series of record references in this Statement, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Corporation (B.A. 20; 44). Through a telephone call to John J. Byrnes, Vice President of the Typographical Union, he was apprised that this labor organization had ordered the picketing in the prosecution of a long-standing labor dispute with the Daily Review Corporation (B.A. 20; 44-45, 50, 52).

Convinced that the Typographical Union, of which he was not a member, was maintaining "a legal picket line," Waugh went to his foreman, William Gordon, and said that he, "as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker" (B.A. 20; 45). Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job" (*ibid.*). But Waugh reiterated his position, insisting that he had a "right as a union man" not to "harm another union" and suggesting that copies of the Review Star be brought out to him in some way which would not entail his crossing the picket line (B.A. 20-21; 45).

Accepting this suggestion for the moment, respondent arranged to have its consignment of Review Stars brought on that day to its plant at Valley Stream, from which point Waugh took them and proceeded on his route as usual (B.A. 21; 45-46). Again on the next day, Friday, March 3, respondent had the papers brought to Waugh outside the picket line (B.A. 21; 46-47). On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, Foreman Gordon told him that

no arrangements like those of the preceding Thursday and Friday would be made and that respondent expected him to cross the picket line. "Otherwise," Gordon said, "you are fired; if you refuse, you are fired" (B.A. 21; 47-48). Persisting in his refusal to cross the picket line, Waugh left respondent's premises (B.A. 21; 48).

On the following day, Waugh returned to ask for work, but Gordon told him: "You know I can't hire you. You're fired." On each succeeding day for about three weeks Waugh requested in vain that respondent hire him (B.A. 21; 48-49).

Unlike Waugh, other members of the Newspaper and Mail Deliverers' Union did not refuse to cross the Typographical Union's picket line. The picketing members of the latter union expressed their resentment against such action on the two days following Waugh's discharge by carrying placards which read: "Is Waugh the only union mail deliverer?" (B.A. 21; 55-56).

The legality of Waugh's discharge was thereafter submitted to an arbitration board, under the terms of a contract between the respondent and Waugh's union (R.A. 12-13). The arbitration board held that Waugh had violated Section 4 of the contract, dealing with the right of foremen to issue orders, and dismissed the grievance (R.A. 10-11, B.A. 25-26).

2. *The Board's conclusions and order*

Noting that the picketing of the Daily Review Corporation was a legitimate activity by the Typo-

graphical Union, the Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line. Accordingly, the Board concluded, Waugh's discharge for this protected activity was violative of Section 8 (a) (1) and (3) of the Act (B.A. 8-10, 28-30).

It was immaterial, the Board held (B.A. 9-10), that Waugh was not a member of the picketing union, for in "refusing to cross the Typographers' picket line [he] was making common cause and acting in concert with the Typographers." And, the Board pointed out (B.A. 10), the safeguards of Section 7 extend to employees who participate in such activities whether or not they are members of the union directly involved—"or indeed, of any union * * *."

The Board rejected (B.A. 8-9) respondent's contention that Waugh's refusal to cross the picket line constituted a "partial strike" outside the protection of the Act. The record showed, the Board pointed out, "that Waugh's failure to perform part of his duties was not occasioned by an insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or alter his own terms and conditions of employment while remaining at work." In *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board had observed that a refusal to cross a picket line was a traditional kind of action, "time-honored in the history of the American labor movement," and, that an employee's refusal to perform such of his duties as

entail dishonoring a picket line is "not a wilfully contrived violation of plant discipline as a means to an end" but, "rather, a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner." 91 NLRB at 1136. The same analysis, the Board concluded, applied in the instant case. "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B.A. 9). It could not, as it had chosen to do, simply discharge him for engaging in an activity protected by the Act.

The Board also rejected (B.A. 8, 30-32) respondent's argument that its contract with the Newspaper and Mail Deliverers' Union justified Waugh's discharge because (1) Waugh's refusal to cross the picket line had violated the contract's no-strike provision and (2) the Adjustment Board, created by the contract to resolve disputes thereunder, had held the discharge proper. In *Rockaway News Supply Company, Inc.*, 94 NLRB 1056, the Board had found that this identical contract, which contained an unlawful union-security agreement and in other respects discriminated against non-members of the union, was illegal in its entirety and should be given no further effect. Accordingly, the Board held here that respondent could not rely on its unlawful agreement, an instrument of unlawful support rendered to the union with which the

agreement had been made, as authority for its discrimination against Waugh.

The Board therefore ordered respondent to cease and desist from its unfair labor practices, to reinstate Waugh with back pay, and to post appropriate notices (B.A. 10-14).

3. *The decision of the court below*

The court below, Judge Clark dissenting, set aside the order of the Board. Recognizing that "the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of the right 'to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection' which is expressly guaranteed by Section 7 of the Act," the court observed that "such refusal is habitual with union workers," that "it is frequently of assistance to the labor organization whose picket line is respected," and that "it is in a broad but very real sense directed to mutual aid or protection" (R.A. 17). The court held, however, that this right, like the right to solicit union membership on company property, enjoys statutory protection only during non-working hours, for "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment . . ." (R.A. 18).

As a further basis for its decision, the court stated that the Board was "unrealistic" in holding that Waugh could have been treated as an economic striker and replaced, but could not lawfully be dis-

charged (R. A. 20). It would be pointless, the court held, merely to permit the employer to place Waugh in the position of a total striker, since his Union would be precluded by Section 8 (b) (4) (A) from supporting him in such a strike. Consequently, the court stated, Waugh's strike would have been foredoomed to failure, and since his employer would have been free to replace him had he gone on strike, the court saw no statutory violation in discharging him.

Finally, the court noted that although it had assumed that Waugh's refusal to cross the picket line was intended to aid the striking union, it felt that "on the evidence in this case that fact is very doubtful" (R. A. 20-21), since Waugh was willing to distribute the papers if someone else crossed the picket line to obtain them, and appeared to be concerned only with his own standing as a union man.[3]

Judge Clark, dissenting, was of the view that the Board acted within the intended spirit of the proviso to Section 8 (b) (4), which protects the refusal

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[3] The court below did not pass upon respondent's contention that Waugh's refusal to cross a picket line violated the no-strike clause in the contract between respondent and Waugh's union. As the dissenting judge observed, that issue "has thus been properly removed from the case," the Board having correctly set aside the entire contract because it contained an illegal union-security clause as well as other evidence of illegality (R. A. 22). Moreover, even the Arbitration Board functioning pursuant to the contract did not find that the refusal to cross a picket line violated the no-strike clause; it held only that the discharge was justified under the contractual provision dealing with the power of the foremen to issue orders (R. A. 10, 11, B. A. 25-26). Consequently, no contract issue obscures consideration of the important questions presented here.

of "any person" to enter upon the premises of an employer other than his own when the employees of that employer are engaged in an authorized and lawful strike. Noting that this proviso was not involved in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which arose prior to the enactment of Section 8 (b), Judge Clark stated that in protecting such a refusal only outside working hours, the holding of the majority amounted to "a practical nullification of the statutory provision" (R. A. 22). The dissent also noted that in rejecting as "unreal" the Board's view that Waugh could not be discharged prior to being replaced, the majority departed from the settled rule, "explained clearly and succinctly in *N. L. R. B.* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750" (*Ibid.*), that economic strikers, although vulnerable to replacement, may not lawfully be discharged for striking.

REASONS FOR GRANTING THE WRIT

1. The court below agreed, as the Board had held, that an employee, who refuses in the course of his employment to cross the lawful picket line of a union of which he is not a member at the premises of an employer other than his own, is assisting the striking union and is engaging in a concerted activity with that union for mutual aid or protection within the meaning of Section 7 of the Act.[4]

[4] This view is diametrically opposed to that expressed by the Seventh Circuit in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124, 127-128, certiorari denied, 342 U. S. 885.

While agreeing that the right to engage in such activity is guaranteed to employees by Sections 7 and 8(a)(1) and (3), Nevertheless, it held that that right is protected from employer reprisal only when it is exercised outside working hours. This holding deprives of protection all refusals to cross picket lines which occur in the course of an employee's employment; it permits employees to adhere to the traditional union practice of respecting picket lines only in their capacity as consumers, and never in their capacity as employees. The effect of such a holding is to rob peaceful primary picketing, anywhere but at a retail establishment, of the response it is largely designed to evoke. The decision thus affects virtually every employee who refuses to cross a picket line, and virtually every labor organization which utilizes picketing as a means of enlisting the support of other workers in a labor dispute. Because the question is of manifest importance in the administration of the Act, and because the holding below conflicts in principle with decisions of this Court, the issue should be authoritatively resolved.

2. This Court last year expressly recognized that pickets at an industrial plant seek "to influence * * * employees of [customers] of the [picketed employer] not to cross the picket line" and stated that "such conduct [by the pickets] was no more than was traditional and permissible in a primary strike." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687, referring to *National Labor Relations Board* v. *In-*

ternational Rice Milling Co., 341 U. S. 665. These cases, together with a companion case, *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 703-705, establish that in Sections 7 and 8 (c) of the Act Congress protected the right of labor organizations by peaceful picketing to induce non-members of the picketing union, employed by other employers, to refrain from crossing a primary picket line in the course of their employment.

The decision below denies the protection of the Act to employees who respond by refusing to cross such picket lines in the course of their employment. We submit that the legislative history does not sustain a congressional purpose to protect primary picketing and yet in effect to destroy its potency by withholding protection from employees who heed its appeal. Cf. *Electrical Workers* v. *National Labor Relations Board*, *supra*, 704; *United States* v. *Hutcheson*, 312 U. S. 219, 233-235; *Duplex Co.* v. *Deering*, 254 U. S. 443, 471, 487-488.[5] The refusal of workingmen, in the course of their employment, to cross picket lines is a time-honored tradition of the labor movement.[6] "The reluctance of workers

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[5] In the *Electrical Workers* case the Court stated, 341 U. S., at 704: "The legislative history does not sustain a congressional purpose to outlaw secondary boycotts under § 8 (b) (4) and yet in effect to sanction them under § 8 (c)."

[6] See *Report of the General Executive Board to the 27th Convention, International Ladies' Garment Workers Union*, Atlantic City, N. J., May 23-June 1, 1950, pp. 691-692:

> Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which

to cross a picket line is notorious." *Printing Specialties and Paper Converters Union* v. *Le Baron*, 171 F. 2d 331, 334 (C. A. 9), petition for certiorari dismissed, 336 U. S. 949.[7] Not only does the Act disclose no purpose to impair the right of workingmen to refuse to cross primary picket lines, but Congress took special pains to insure that its prohibition of secondary boycotts should not inadvertently have the effect of impairing that right. The final proviso to Section 8(b)(4) declares that:

> nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

The proviso clearly recognizes and protects the right of an individual employee to refuse to cross a primary picket line. The term "person" is defined in Section 2(1) as including "one or more individuals," and the use of the phrase "his own employer" in the parenthetical clause shows that Con-

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alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life.

[7] Cf. *National Labor Relations Board* v. *Service Trades Chauffeurs*, 191 F. 2d 65, 68 (C. A. 2); Barbash, *Labor Unions in Action* (1948), p. 129.

gress contemplated refusals by individual employees. The approval of respect for primary picket lines by individual employees which the proviso manifests must be taken as reflecting Congress' attitude toward the protection of such activities under Section 7. Cf. *Cyril de Cordova & Bro.*, 91 NLRB 1121, 1137; *Newspaper & Mail Deliverers' Union, etc.*, 90 NLRB 2135, 2146-2149.[8] By affirming the immunity of this practice, Congress must be deemed to have intended to make it clear that the protection which the Act extends to primary picketing includes the correlative employee response which such picketing is designed to evoke.

That Section 7 gives statutory protection to the right to respect a picket line during the course of employment is further demonstrated by the settled scope of the correlative right to refrain from the activities therein protected. This Court recognized in the *Rice Milling* case, *supra*, 341 U. S. at 672, that Sections 7 and 8(b)(1)(A) protect employees who desire to cross picket lines from restraint and coercion at the hands of labor organizations. See also *Medford Building & Construction Trades Council*, 96 NLRB, No. 10; *International Longshoremen's and Warehousemen's Union*, 79 NLRB 1487, 1504; *United Construction Workers*, 94 NLRB 1731,

[8] The prohibitions of Section 8 (b) do not apply to employees acting in their individual capacities; they are directed only against labor organizations and their agents. Hence the proviso, as it applies to individual workingmen, cannot mean merely that such conduct does not violate the Act, else it would be superfluous. It can be given effect only by regarding it as a recognition that the right of an individual to refuse to cross a primary picket line is protected by the Act.

1733. Protection of the right to cross derives from the guarantee, in Section 7 of the Act, as amended, of the right "to refrain from" participating in activities protected by that Section. The purpose of the addition was to "make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join, or did not care to participate in a strike or a picket line." 93 Cong. Rec. 6859, 2 Leg. History of the Labor Management Relations Act, p. 1623. Manifestly, the right to cross a picket line is protected only if it is the converse of an already protected affirmative right, *i. e.*, to respect a picket line. If the latter right is not protected, the crossing of a picket line would not constitute "refraining from" exercising a right guaranteed by Section 7, and hence would enjoy no protection against union restraint and coercion. The scheme and structure of these interlocking provisions thus demonstrate that it was Congress' purpose and policy to guarantee to employees the right to decide voluntarily whether or not to cross a picket line and to protect the exercise of that right against both union restraint and coercion and employer reprisal.

3. In holding that the right to refuse to cross a primary picket line, like the right to solicit union membership (*Peyton Packing Co.*, 49 NLRB 828, 843), may properly be exercised only outside of working hours, the court below misconstrued and misapplied the decision of this Court in *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793. In that case, the Court rec-

ognized that the rights guaranteed employees by the Act were meaningless unless the Act also assured adequate opportunity to exercise them. In determining how far organizational opportunity should be extended it was pertinent, of course, to consider the impact of such extension upon conflicting interests of the employer. "Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U. S. at 798. The *Republic Aviation* case holds that insofar as the right to solicit union membership on the employer's property is concerned, the balance is appropriately struck by permitting solicitation during non-working time while disallowing it during working time.

However, to impose the "same limitations' upon the very different right to refuse to cross primary picket lines, as the court below did (R. A. 18), is to destroy virtually any opportunity to exercise that right, and thereby to repudiate the basic principle which the *Republic* case vindicates. That case clearly was not intended to draw an universally applicable "distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time" (R. A. 18). A strike, for example, necessarily involves violation of the employer's rules; yet it would hardly be suggested that the right to strike is protected only if it is exercised outside working hours. The right, as an employee, to respect a primary picket line is analogous, in this respect, to the right to strike and in sharp contrast to the right to solicit union member-

ship, in that it can ordinarily be exercised only during working hours. Indeed, a principal objective in picketing an industrial plant is to persuade employees of other employers to refuse to cross the picket line *during* the course of their employment. Moreover, when Congress in the final proviso to Section 8(b)(4) excluded refusals to cross a lawful picket line from the new unfair labor practices of unions and their agents, it was necessarily referring to refusals during working hours, for the only concerted employee refusals to which the prohibitions of Section 8(b)(4) apply are those which occur "in the course of their employment" (Section 8(b)(4)). Similarly, the protection accorded by Section 8(b)(1)(A) to the right of employees to cross a picket line cannot be thought to have been limited to non-working time. The converse right, to respect a picket line, likewise cannot be so limited.

Accordingly, the protection which the Act extends to refusals to cross primary picket lines, like the protection extended to strikes and other concerted activities, must be measured in the context of the exercise of those rights during working hours.[9] Of course, refusal to cross a picket line during working hours may entail partial disobedience of the employer's instructions, and interfere to some

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[9] Cf. *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3); *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613, 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717-718 (C. A. 8).

extent with the employer's business. Similar, and far more drastic, consequences attend a strike, but it has never been held that they warrant denial of the Act's protection to strikers. See, *J. A. Bentley Lumber Co.* v. *National Labor Relations Board,* 180 F. 2d 641 (C. A. 5); *National Labor Relations Board* v. *Kennametal,* 182 F. 2d 817 (C. A. 3). In strike cases, where the employee's statutory right can effectively be exercised only during working hours and the exercise necessarily involves interruption of the employer's business, it has long been settled that the conflicting interests are to be reconciled by permitting the employer to continue production by replacing the recalcitrant employees, but precluding him from severing their employment unless and until they have been replaced. *National Labor Relations Board* v. *MacKay Radio & Telegraph Co.,* 304 U. S. 333, 345-346; *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 750 (C. A. 9), and cases cited therein. This distinction between discharge and replacement has important practical consequences, in view of the reluctance of workingmen to risk stigmatization as "scabs" by replacing picketing employees. Such a resolution of the conflicting interests, which has become well settled in cases where the exercise of employee rights results in a total stoppage of work, would seem *a fortiori* appropriate and valid where the exercise results in only a partial cessation of work.[10]

The holding of the court below that because an

[10] Cases cited, note 9, *supra*, p. 17.

employer concededly may lawfully replace an employee who refuses in the course of his employment to cross a primary picket line he may also discharge the employee *prior to replacing him*, thus conflicts in principle with the decisions of this Court and of other Courts of Appeals which are collected in the *Globe Wireless* opinion, *supra*. The inability of the court below to "follow the Board's reasoning" (R. A. 19) stems from the court's fallacious assumption that if respondent had refused to permit Waugh to perform any other services as long as he refused to cross the picket line—as respondent concededly was privileged to do—Waugh would have been in the position of a secondary striker seeking to force his employer not to deal with Daily Review Corporation, a position which, if taken by his Union, would have violated Section 8(b)(4)(A). The court's argument misconstrues Section 8(b)(4) and ignores the proviso to that section. Thus it is clear that, contrary to the court's assumption, Waugh's union could have come to his aid and the members of that union could validly, by concerted action, have joined him in refusal to cross the picket line. The proviso to Section 8(b)(4) expressly provides that it is not a violation of the Act for a labor organization to induce or encourage its members to refrain from crossing a primary picket line authorized by another labor organization at the premises of another employer. *Cf. Newspaper & Mail Deliverers' Union, etc.*, 90 NLRB 2135, 2146-2149. Concededly, the employer could have converted

such a limited refusal to perform services into a complete strike by denying Waugh or any other employee the opportunity to perform those duties which they were willing to perform. In that event, however, the strike would be an involuntary one, and the resultant total stoppage would not have been a concerted "refusal" to perform services within the reach of Section 8(b)(4). Certainly their employer's refusal to permit them to perform other services could not transform their lawful objective into an unlawful one.[11]

4. The court below holds that statutory protection cannot be extended to refusals to cross a picket line during working hours because to do so "would be to permit an employee unilaterally to dictate the terms of his employment, which it is well settled he may not do" (R.A. 18). This holding is based upon a misconception of the objective which underlies employee refusals to cross picket lines. The employee who voluntarily refuses to cross a picket line does so, not in order to change the terms of his own employment, but to assist the picketing union (or to protect his own standing as a union man, an

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[11] That Waugh's union could lawfully have induced all of its members to do just what Waugh did, thereby lending effective support to his refusal to cross the picket line, refutes the suggestion of the court below that "it is inconceivable that Waugh could have won his strike" (R. A. 20). Faced with such action, respondent may well have been unable or unwilling to replace any of the employees and have acquiesced in their refusal to cross the picket line. In any event, it has never heretofore been suggested that the distinction between discharge and replacement may be ignored as "wholly unrealistic" merely because it appears that the employer may succeed in replacing the striking employees.

aspect of maintaining union membership). His goal remains the same whether his refusal occurs during or outside the course of his employment. When the refusal occurs during working hours, it entails nonperformance of a part of his duties. But this is a consequence, not an aim of his conduct. For this reason, cases like *Conn* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), upon which the court below relied, are wholly inapposite.[12] In *Conn*, simply to effectuate their objective of doing no overtime work, the employees refused to work overtime when instructed by their employer to do so. But where, as here, another objective is shown to motivate the employees, the mere fact that they cease performing a part, rather than all of their duties, as in a full-fledged strike, does not establish that their

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[12] The court also relied on two Eighth Circuit cases, *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496, and *National Labor Relations Board* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108. Neither case is in point. In *Kopman*, as in *Conn*, the employee in refusing to perform certain work was in fact attempting to prescribe the terms on which he would work. In *Montgomery Ward*, the employer told the employees who refused to work on "struck" goods that they would have to do the work or leave the plant, *i.e.*, assume the position of full-fledged strikers. Only when they refused both alternatives were they discharged. 157 F. 2d, at 496. Respondent here summarily discharged the employee without giving him the alternative of being treated as an economic striker.

Insofar as the protected character of the activity is concerned, the traditional, legitimately motivated refusal to cross a picket line, which is here involved is to be contrasted with the "recurrent or intermittent unannounced stoppage of work to win unstated ends," a "new technique for bringing pressure on the employer" which this Court held unprotected in *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 249, 264.

partial stoppage is an end in itself, or that it is their objective thereby to alter the terms of their employment.[13] Partial, as distinguished from total, stoppages often are, as the Court of Appeals for the Third Circuit stated in *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817, 819, "more reasonable and less productive of loss to all concerned than an outright strike. The language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they assert the maximum economic pressure and call a strike."

It is true, of course, that even where alteration of their terms of employment is not the objective of employees who engage in a partial stoppage, the effect of their conduct from their employer's point of view is to leave them willing to perform some, but not all, of their duties. It is precisely to enable the employer to control production in these situations that the Board permits the employer to require such employees to elect whether they will perform all of their duties or none.[14] Faced with this alternative, if the employees elect to perform none, they are subject to the same vulnerability to replacement as are economic strikers. To go further than this and permit an employer simply to discharge employees for engaging in lawful activities for a lawful purpose is to frustrate completely the statutory protection given these activities.

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[13] Cases cited note 9, *supra*, p. 17.

[14] See *National Labor Relations Board* v. *Montgomery Ward & Co.*, *supra*, note 12, p. 21.

5. In sum, this case raises a question of grave importance—whether an employee who follows the basic tenet of organized labor and refuses to cross a picket line enjoys statutory protection from discharge for so doing. That question vitally affects virtually every employee and organization in the realm of organized labor. The court below recognized that an employee who respects a picket line is exercising a right protected by the Act, but limited the protection to nonworking time. Thus limited, the right all but vanishes. To support this limitation the court below relied upon a demonstrably erroneous analogy to the prohibition against soliciting union memberships during working hours. In assuming that Waugh's union could not have joined him in respecting the picket line, the court ignored the plain purpose of the proviso to Section 8(b)(4) of the Act. It also erred in apparently treating the right to refuse to cross a picket line as standing on the same footing as attempts by "partial strike" unilaterally to change conditions of employment. In further rejecting as "unrealistic" the Board's holding that the employee could be replaced but not discharged, the decision below is in conflict with heretofore settled authority.

6. In seeking certiorari we are fully mindful of this Court's denial of certiorari in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which, in a different context, also raised the question of the extent to which employees are protected

by the statute when they refuse to cross a picket line. We assume that the denial of certiorari did not reflect consideration of the merits of that question by this Court. However, it may be pertinent to observe that factors which may have militated against a grant of certiorari in the *Illinois Bell* case are absent here. In the first place, an additional question, whether, under the peculiar facts of that case, the refusals improperly tended to usurp the authority of a bargaining agent, was clearly presented and may have influenced the holding of the Seventh Circuit. Secondly, that case presented the question in a less typical posture; refusal to cross the picket line in that case prevented the employees from entering their own place of employment and hence from performing any services for their employer. The significance of the factual distinction is reflected in the fact that the conduct involved in *Illinois Bell* would not have been protected by the proviso to Section 8 (b) (4), (*supra*, p. 13). Moreover, as Judge Clark observed in his dissent in the court below, the *Illinois Bell* case arose prior to the 1947 amendments, and the effect of the proviso to Section 8 (b) (4), itself an important issue in the administration of the amended Act, was therefore not presented in that case. Finally, the court below expressly stated, contrary to the holding in *Illinois Bell*, that a single employee who refused to cross a picket line was exercising the right guaranteed by statute to "assist labor organizations * * * and to engage in other concerted activity for the purpose of * * *

mutual aid or protection" (R. A. 17). Hence, in this case the principal question stated in the petition for certiorari in the *Illinois Bell* case was answered favorably to the Board and in conflict with the views of the Seventh Circuit. That conflict in approach enhances the importance of authoritative resolution by this Court of the question here presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing

in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the Dis-

trict of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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No. 318

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 73–80) are reported at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 7–36) are reported at 95 NLRB 336.

JURISDICTION

The opinions of the Court of Appeals were filed on May 12, 1952, and its decree was entered on August 8, 1952 (R. 81). A motion to extend until September 9, 1952, the time for filing the petition for certiorari was granted by Mr. Justice

Clark on August 1, 1952 (R. 83). The petition for writ of certiorari was filed on September 5, 1952, and granted on October 27, 1952 (R. 84). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross the lawful picket line of a labor organization of which he is not a member at the premises of one who supplies goods to the employer.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151, *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 67–72. The pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C., 101, *et seq.*), referred to in this brief, are likewise reprinted in the Appendix, *infra*, pp. 72–73.

STATEMENT

1. THE FACTS

Upon the usual proceedings under Section 10 of the Act, the Board, on July 20, 1951, issued its findings of fact, conclusions of law, and order

(R. 7–36). The facts, which are not in dispute, may be summarized as follows:

Charles Waugh, the employee whose discharge on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years (R. 19; 40).[1] He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees (R. 19; 49, 56–60).

Working five days a week (Tuesday through Saturday), from 9:45 a. m. to 6:30 p. m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications (R. 20; 42–43). Among his scheduled stops was one at the plant of the Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily Review Star. Before 10:30 a. m. on each of his working days except Saturday, Waugh was required to stop there and pick up a supply of Review Stars for delivery at subsequent points on his route (R. 20; 42, 43, 47). This operation con-

[1] Where a semicolon appears in a series of record references in this Statement, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

sumed about 10 minutes of each working day on which it was required (R. 20; 49).

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of the Daily Review Corporation (R. 20; 44). Through a telephone call to John J. Byrnes, Vice President of the Typographical Union, he was apprised that this labor organization had ordered the picketing in the prosecution of a long-standing labor dispute with the Daily Review Corporation (R. 20; 44–45, 50, 52).

Convinced that the Typographical Union, of which he was not a member, was maintaining "a legal picket line," Waugh went to his foreman, William Gordon, and said that he, "as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker" (R. 20; 45). Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job" (*ibid.*). But Waugh reiterated his position, insisting that he had a "right as a union man" not to "harm another union" and suggesting that copies of the Review Star be brought to him in some way which would not entail his crossing the picket line (R. 20–21; 45).

Accepting this suggestion for the moment, respondent arranged to have its consignment of Review Stars brought on that day to its plant at Valley Stream, from which point Waugh took

them and proceeded on his route as usual (R. 21; 45–46). Again on the next day, Friday, March 3, respondent had the papers brought to Waugh outside the picket line (R. 21; 46–47). On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, Foreman Gordon told him that no arrangements like those of the preceding Thursday and Friday would be made and that respondent expected him to cross the picket line. "Otherwise," Gordon said, "You are fired; if you refuse, you are fired" (R. 21; 47–48). Persisting in his refusal to cross the picket line, Waugh left respondent's premises (R. 21; 48).

On the following day, Waugh returned to ask for work, but Gordon told him: "You know I can't hire you. You're fired." On each succeeding day for about three weeks Waugh requested in vain that respondent hire him (R. 21; 48–49).

Unlike Waugh, other members of the Newspaper and Mail Deliverers' Union did not refuse to cross the Typographical Union's picket line. The picketing members of the latter union expressed their resentment against such action on the two days following Waugh's discharge by carrying placards which read: "Is Waugh the only union mail deliverer?" (R. 21; 55–56).

The legality of Waugh's discharge was thereafter submitted to an arbitration board, under the terms of a contract between the respondent and

Waugh's union (R. 70). The arbitration board held that Waugh had violated Section 4 of the contract, dealing with the right of foremen to issue orders, and dismissed the grievance (R. 69, 25–26).

2. THE BOARD'S CONCLUSIONS AND ORDER

Noting that the picketing of the Daily Review Corporation was a legitimate activity by the Typographical Union, the Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line. Accordingly, the Board concluded, Waugh's discharge for this protected activity was violative of Section 8 (a) (1) and (3) of the Act (R. 8–10, 28–30).

It was immaterial, the Board held (R. 9–10), that Waugh was not a member of the picketing union, for in "refusing to cross the Typographers' picket line [he] was making common cause and acting in concert with the Typographers." And, the Board pointed out (R. 10), the safeguards of Section 7 extend to employees who participate in such activities whether or not they are members of the union directly involved—"or indeed, of any union * * *."

The Board rejected (R. 8–9) respondent's contention that Waugh's refusal to cross the picket line constituted a "partial strike" outside the protection of the Act. The record showed, the Board pointed out, "that Waugh's failure to perform part of his duties was not occasioned by an

insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or alter his own terms and conditions of employment while remaining at work." In *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board had observed that a refusal to cross a picket line was a traditional kind of action, "time-honored in the history of the American labor movement," and, that an employee's refusal to perform such of his duties as entail dishonoring a picket line is "not a wilfully contrived violation of plant discipline as a means to an end" but, "rather, a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner." 91 NLRB, at 1136. The same analysis, the Board concluded, applied in the instant case. "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties, or, as a striker, to vacate his job and make way for his replacement by the Respondent" (R. 9). It could not, as it had chosen to do, simply discharge him for engaging in an activity protected by the Act.

The Board also rejected (R. 8, 30–32) respondent's argument that its contract with the Newspaper and Mail Deliverers' Union justified Waugh's discharge because (1) Waugh's refusal to cross the picket line was a violation of the

contract's no-strike provision and (2) the Adjustment Board, created by the contract to resolve disputes thereunder, had held the discharge proper. In *Rockaway News Supply Company, Inc.*, 94 NLRB 1056, the Board had found that this identical contract, which contained an unlawful union-security agreement and in other respects discriminated against nonmembers of the union, was illegal in its entirety and should be given no effect.[2] Accordingly, the Board held here that respondent could not rely on its unlawful agreement, an instrument of unlawful support rendered to the union with which the agreement had been made, as authority for its discrimination against Waugh.

The Board therefore ordered respondent to cease and desist from its unfair labor practices, to reinstate Waugh with back pay, and to post appropriate notices (R. 10–14).

3. THE DECISION OF THE COURT BELOW

The court below, Judge Clark dissenting, set aside the order of the Board. Recognizing that

[2] The Board reached the identical conclusion with regard to an identical contract in *Gaynor News Co.*, 93 N. L. R. B. 299. This conclusion, approved by the Court of Appeals which entered a decree enjoining that company from "performing or giving effect to [that] contract" in *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719 (C. A. 2), was not challenged in the petition for certiorari filed in that case, pending as No. 371, this Term. Enforcement proceedings against respondent in the case cited in the text above have not yet been instituted; they await the ultimate determination of the issues in the *Gaynor* case.

"the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of the right 'to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection' which is expressly guaranteed by Section 7 of the Act," the court observed that "such refusal is habitual with union workers," that "it is frequently of assistance to the labor organization whose picket line is respected," and that "it is in a broad but very real sense directed to mutual aid or protection" (R. 75). The court held, however, that this right, like the right to solicit union membership on company property, enjoys statutory protection only during non-working hours, for "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment * * *" (R. 76).

As a further basis for its decision, the court stated that the Board was "unrealistic" in holding that Waugh could have been treated as an economic striker and replaced, but could not lawfully be discharged (R. 78). It would be pointless, the court held, merely to permit the employer to place Waugh in the position of a total striker, since, in its view, his Union would be precluded by Section 8 (b) (4) (A) from supporting him in such a strike. Consequently, the court stated, Waugh's strike would have been foredoomed to failure, and since his employer would have been

free to replace him had he gone on strike, the court saw no statutory violation in discharging him.

Finally, the court noted that although it had assumed that Waugh's refusal to cross the picket line was intended to aid the striking union, it felt that "on the evidence in this case that fact is very doubtful" (R. 78–79), since Waugh was willing to distribute the papers if someone else crossed the picket line to obtain them, and appeared to be concerned only with his own standing as a union man.[3]

Judge Clark, dissenting, was of the view that the Board acted within the intended spirit of the proviso to Section 8 (b) (4), which protects the refusal of "any person" to enter upon the premises of an employer other than his own when the employees of that employer are engaged in an authorized and lawful strike. Noting that this proviso was not involved in *National Labor*

[3] The court below did not pass upon respondent's contention that Waugh's refusal to cross a picket line violated the no-strike clause in the contract between respondent and Waugh's union. As the dissenting Judge observed, the Board having correctly set aside the entire contract because it contained an illegal union-security clause as well as other evidence of illegality, that issue "has thus been properly removed from the case" (R. 80). See n. 2, *supra*. Moreover, even the Arbitration Board functioning pursuant to the contract did not find that the refusal to cross a picket line violated the no-strike clause; it held only that the discharge was justified under the contractual provision dealing with the power of the foremen to issue orders (R. 69, 25–26).

Relations Board v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which arose prior to the enactment of Section 8 (b), Judge Clark stated that in protecting such a refusal only outside working hours, the holding of the majority amounted to "a practical nullification of the statutory provision" (R. 80). The dissent also noted that in rejecting as "unreal" the Board's view that Waugh could not be discharged prior to being replaced, the majority departed from the settled rule, "explained clearly and succinctly in *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750" (*ibid.*), that economic strikers, although vulnerable to replacement, may not lawfully be discharged for striking.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Section 8 (a) (1) and (3) of the Act does not protect an employee from discharge for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of his employer's supplier.

2. In not enforcing the order of the Board.

SUMMARY OF ARGUMENT

A

As the court below recognized, an employee who refuses to cross a lawful picket line at the

plant of his employer's supplier thereby "assists" the striking labor organization, and acts in "concert" with the strikers "for mutual aid" within the meaning of Section 7 of the original and the amended Act. Contrary to the view of the court below, however, the protection against discharge provided by Section 7 extends to employees who respect such a picket line during, as well as outside, their regular working hours. Sections 2 (3) and (9) of both the original and the amended Act, defining "employee" and "labor dispute," respectively, establish that one who ceases work because of a labor dispute remains an "employee" entitled to the rights guaranteed in Section 7, even though the labor dispute is one to which neither he nor his employer is a party. The history of these definitions, which grew out of Congress' determination to overturn such decisions as *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, establish that Congress intended to protect precisely the traditional tactic of organized labor which is here involved.

B

The 1947 amendments to the Act, although they imposed restrictions on sympathetic action by labor unions, did not represent a full return to the philosophy of the *Duplex* case in this regard. On the contrary, Congress in the amended Act left unchanged the definitions of "employee" and "labor dispute," thereby continuing to reject the

view that employees should enjoy statutory protection only when they cease work because of a dispute with their own employer. The amended Act outlaws secondary boycotts, but leaves unaltered the right of labor organizations to engage in primary picketing (*National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665), and the corollary right of employees of other employers to respect a primary picket line. Indeed Congress specifically provided in the proviso to Section 8 (b) (4) of the amended Act that its prohibitions were not to be read as extending to an employee's refusal during the course of his employment to cross a lawful picket line at the plant of his employer's supplier. Moreover, in the amended Act Congress prohibited a labor organization from coercing an employee into respecting a picket line, by providing that the employee had a right "to refrain from" exercising the rights guaranteed by the Act. The employee's freedom to cross or not to cross the picket line is therefore protected against reprisal from the union or the employer.

C

The court below misread this Court's decision in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, as laying down a rule that the rights guaranteed in Section 7 are to be protected only outside working hours. The rule of the *Republic* case is that the employee

rights guaranteed in Section 7 must be balanced against an employer's right to continue production in such a way as to afford ample protection to both. The *Republic* case approved the Board's conclusion that the right to solicit union memberships, though limited to nonworking hours in the interest of efficient production, remains adequately protected because nonworking time affords ample opportunity for its exercise. However, the right of an employee to respect a picket line is virtually destroyed if it is subjected to that limitation; outside working hours the right can be exercised by employees only acting as consumers and never as employees. The proper balance to be struck in this case is to treat the employee who refuses to cross the picket line as occupying the same legal status as an economic striker. Under settled law, an employer may *replace* such a striker in order to continue production, but he may not penalize the striker for exercising his rights by *discharging* him before he is replaced.

The distinction between immunity to discharge and vulnerability to replacement is firmly settled in the law, and is indeed at the very heart of the concept of "protection" which the Act accords to employees who cease work in consequence of a labor dispute. The court below suggested, however, that in the present case the distinction between "discharge" and "replacement" was "wholly unrealistic," because in its view Waugh's union could not lawfully have supported his

"strike," and it would have been foredoomed to failure. But it is not clear, as the court below assumed, that Section 8 (b) (4) prohibited Waugh's union from encouraging Waugh's fellow employees to respect the picket line as he did. In any event, statutory protection against discharge for engaging in a protected activity is not limited to instances in which the activity has even a fair chance of success.

Finally, the court below urged that to extend protection to an employee who refused to cross a picket line during working hours "would be to permit an employee unilaterally to dictate the terms of his employment." Waugh's refusal to cross a picket line, however, was not intended to effect any change in the terms of his employment, but only to assist the striking union. Consequently the "partial strike" case relied on by the court below are not in point, for in those cases the employees sought to enforce their own demands by refusing to work except under the very terms on which they were insisting. The question whether a strike or other concerted activity enjoys statutory protection turns not upon whether it is conducted outside working hours, nor on whether it results in a complete, as distinguished from a partial, cessation of work, but on whether the means by which it is conducted, and the end it envisages, are lawful. In the instant case Waugh's refusal to cross the

picket line was the normal traditional method by which a union man assists another union and acts in concert with the strikers, and the legality of his objective is beyond dispute. It follows that the normal protection which, as the court below conceded, Section 7 extends to employees who respect a picket line during nonworking hours, extends as well to employees who exercise the same right during working hours.

ARGUMENT

AN EMPLOYER VIOLATES THE NATIONAL LABOR RELATIONS ACT BY DISCHARGING AN EMPLOYEE BECAUSE THE EMPLOYEE HAS REFUSED, IN THE COURSE OF HIS EMPLOYMENT, TO CROSS A LAWFUL PICKET LINE AT THE PLANT OF THE EMPLOYER'S SUPPLIER

The present case concerns one of the basic traditions of the organized labor movement—the tradition that a union man will not cross a lawful picket line maintained by his own or another union. The issue here presented is whether and how far the National Labor Relations Act, as amended, protects the right of an employee to adhere to that tradition by refusing to cross a picket line on the premises of his employer's supplier. The court below recognized that the right so to refuse is protected by the Act. But it limited that protection to nonworking time. Thus limited, the right all but vanishes. We believe that the exercise of that right is protected at all times, and that the discharge of the employee here for exercising that right during work-

ing hours was an unlawful interference with that right in violation of section 8 (a) (1) and (3) of the Act. We believe that Congress explicitly so determined in the Wagner and Taft-Hartley Acts; alternatively, if the reconciliation of the employee's right with the rights of his employer is left open in this situation, we believe that the court below erred in rejecting the rule which the Board adopted.

A. UNDER THE WAGNER ACT REFUSAL TO CROSS A PICKET LINE WAS A PROTECTED ACTIVITY

1. *The pertinent statutory provisions define the scope of employee activity protected against discharge.*—The legislative pattern of the Wagner Act, which was not materially changed in this regard by the Taft-Hartley amendments, establishes a broad category of activities in connection with self-organization, collective bargaining and labor disputes in which employees have a right to engage (Section 7, original and amended Act). Congress provided in Section 8 (1) of the Act (Section 8 (a) (1) of the Act, as amended), that it should be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In Section 2 (3) of both the original and the amended Act Congress stated that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise," and further defined the term "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Finally, in Section 2 (9) of both the original and the amended Act Congress defined the term "labor dispute" to include any controversy involving representation, or terms, tenure or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee."

It is within the context of this statutory scheme that the legality of Waugh's discharge by his employer must be judged. Waugh was discharged because, in consequence of a then current labor dispute between Nassau County Typographical Union and the Daily Review Corporation, he ceased and refused to perform certain work required by his employer, namely, to enter the premises of the Daily Review Corporation and there pick up a supply of *Review Stars* for subsequent delivery. By the plain terms of Sections 2 (3) and (9) this refusal to render services did not remove Waugh from the Act's protection. Since his refusal to work was entirely a consequence of, and entirely limited to, the current labor dispute between Daily Review Corporation and the Typographical Union, he remained throughout an "employee," entitled to the protection of Section 7. Accordingly, if the type of activity in which Waugh engaged falls within the

category of activities enumerated in Section 7, Waugh's discharge for engaging in it was unlawful, for an employer may not discharge an employee for engaging in activities which Section 7 protects. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45–46; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; *National Labor Relations Board* v. *Phoenix Mut. Life Insurance Co.*, 167 F. 2d 983, 988 (C. A. 7), certiorari denied, 335 U. S. 845; *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773, 774 (C. A. 5).

2. *Refusal to cross a picket line is an act of "assistance" to a labor organization, and a "concerted activit[y] for * * * mutual aid" within the meaning of Section 7.*—We turn first to the language of Section 7, to determine whether Waugh's conduct falls within its scope. In addition to its guarantee of the right to form and join labor organizations, and to bargain collectively through freely chosen representatives, Section 7 of the Act guarantees to employees the right "to assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection." It is hardly open to controversy that when an employee refuses in the course of his employment to cross a picket line at the plant of another employer who is involved in a labor dispute, the employee thereby "assists" the labor organization in its dispute with that employer. Indeed, the request

for precisely such assistance, implicit in every picket line, is perhaps the most common and traditional concomitant of a strike. In the words of this Court, it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence * * * employees of a customer of the [picketed employer] not to cross the picket line." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687.

The response of the customer's employees, particularly when they are members of labor organizations, to such an appeal for assistance is equally traditional.[4] As the Court of Appeals for the Ninth Circuit has stated: "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate

[4] See *Report of the General Executive Board to the 27th Convention, International Ladies' Garment Workers Union*, Atlantic City, N. J., May 23–June 1, 1950, pp. 691–692:

"Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life."

if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.'" *Printing Specialties Union* v. *National Labor Relations Board*, 171 F. 2d 331, 334, petition for certiorari dismissed, 336 U. S. 949.

The nature and motive of the pickets' appeal and of the response thereto demonstrate, we believe, not only that refusal to cross a picket line is a most obvious act of "assistance" to a labor organization, but that it is also a form of "concerted activities for the purpose of * * * mutual aid or protection." Manifestly, when pickets invite employees of customers to refrain from crossing the picket line they are inviting those employees to make common cause with them, to withhold their services from the picketed employer just as the strikers are withholding theirs, and to the same end: to induce the picketed employer to yield to the union's demands. When those employees accept this invitation by refusing to cross a picket line, they thus act in "concert" with the pickets and with the employees they represent, in the most obvious and literal sense.[5]

[5] This is not to say, of course, that employees who refuse to cross picket lines necessarily act in concert with other employees of their own employer. See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 670–671. But concert in this sense, *i. e.*, between employees of the same employer, is manifestly unnecessary to establish the existence of concerted activity protected by Section 7. See Sections 2 (3) and (9), discussed, *infra*, pp. 25–32. In any event, even the existence of "concert" as between the pickets and the customer's employees is unnecessary to establish that

That the customer's employees who refuse to cross such a picket line may have no immediate stake in the outcome of the labor dispute between the supplier and his employees does not, of course, establish that their refusal is not "for the purpose of * * * mutual aid or protection." In his classic opinion for the court in *National Labor Relations Board* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 505–506 (C. A. 2), Judge Learned Hand said:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most sense, as nobody doubts.

Judge Hand then added, in language particularly significant here:

> So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who

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the employees who refuse to cross are protected. Their conduct is plainly "assistance" to the striking labor organization, and "assistance" is protected whether accorded individually or in concert.

will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." Cf. *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, 7 Cir., 111 F. 2d 869, 873, 874. *It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained* (*e. g., Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 471, 472, 474 * * *), *but it seems to us that the* [*Wagner*] *act has put an end to this.* [Italics supplied.]

The evidence in this record confirms what the foregoing discussion establishes in general, namely, that an employee who refuses to cross a picket line at the premises of his employer's supplier does so to "assist" the picketing union in its labor dispute, and by thus allying himself with the union engages with it in a "concerted activit[y] for the purpose of * * * mutual aid or protection." Waugh himself stated, at the time, that refusal was motivated by his determination not to "harm another union" (R. 45). The striking union made it abundantly clear that one of the purposes of its picket line was to prevent Waugh and his fellow employees from obtaining papers from the Daily Review plant, and that insofar as Waugh furthered this purpose he "as-

sisted" the striking union. The placards carried by the pickets, "Is Waugh the only union mail deliverer?" (R. 55), were calculated to inspire Waugh's fellow employees to assist the striking union, as Waugh had assisted it, by refusing to cross the pocket line.[6]

Moreover, in making common cause with the strikers, Waugh was clearly interested in promoting solidarity with employees in an enterprise closely interrelated with his own. The strikers he supported were involved in the newspaper industry, the same industry which Waugh served as a routeman. Aware of the connection between his employment in distributing newspapers and the work of producing them, he had sought, prior to the events of this case, to organize the Daily Review Corporation's employees in the union of which he was a member (R. 49). Although his effort had been unsuccessful, his respect for their picket line in this case was obviously a means of seeking potential, if not immediate, benefits for himself as well as for the striking union.

3. *Sections 2 (3) and (9) of the Act show that*

[6] Respondent urged that because Waugh was willing to deliver the papers if someone else crossed the picket line to obtain them, he was not really assisting the strikers. But the fact remains that Waugh's action gave the striking union some assistance, as he intended and as the strikers acknowledged; the fact that he could have rendered further assistance is no basis for withdrawing statutory protection from the assistance he saw fit to give.

the protection of Section 7 cannot be denied to an employee who refuses, in the course of his employment, to cross a picket line at the plant of his employer's supplier.—The court below agreed that refusal to cross a picket line was "frequently of assistance to the labor organization whose picket line was respected" and that it was a concerted activity for mutual aid (R. 75) which was protected by Section 7. It held, however, that this activity was not protected when it occurred during working hours and thus involved a refusal by the employee to perform services for his employer (R. 76). This limitation reads Section 2 (9) entirely and Section 2 (3) largely out of the Act. The very purpose of those provisions was to protect employees who cease work in support of another labor organization in whose dispute neither they nor their employer have an immediate interest. To deny protection to such activity simply because it involves a work stoppage is to frustrate the clear will of Congress.

(a) *The function of Sections 2 (3) and (9) is,* inter alia, *to extend the protection of Section 7 to employees who cease work in consequence of a labor dispute to which neither they nor their employers are immediate parties.*—Read together, Sections 7 and 8 (a) (1) establish, as we have shown, that employees are not to suffer job reprisals for engaging in the class of activities comprehended by Section 7. In Section 2 (3) and

(9) Congress defined the category of "employees" upon whom the protection of Section 7 was conferred. Guarding against the possibility that employees would be protected in exercising the rights conferred upon them by Section 7 only insofar as they sought self-organization or collective bargaining from their own employer, Congress first declared that the term "employee" shall "include any employee, and shall not be limited to the employees of a particular employer." By virtue of this provision employees have been held to be protected against discharge by their own employer for acting as bargaining agents for employees of other employers (*Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 111 F. 2d 869, 873–874 (C. A. 7)); for supporting those who are engaged in organizational activity among employees of other employers (*National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. 2d 585, 594–596 (C. A. 9)); or for publishing broadsides castigating their employer for supporting the stand of another employer who is engaged in a labor dispute (*National Labor Relations Board* v. *Peter Cailler Kohler Co.,* 130 F. 2d 503 (C. A. 2)).

In addition, Congress guarded against the possibility that protection would be denied to employees whose exercise of rights guaranteed by Section 7 involves cessation or refusal to work. Thus, Congress declared that the "term 'employee' shall include * * * any individual

whose work has ceased as a consequence of, or in connection with, any current labor dispute." See, S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6–7. It is settled that the effect of this clause is to protect the right to strike (*National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 345; *Bus Employées* v. *Wisconsin Board*, 340 U. S. 383, 389), and to assure that an employer may not discharge or otherwise penalize employees because they have engaged in a lawful strike.

Finally, further to guard against the possibility that this protection would extend only to employees who cease work in support of a labor dispute involving their own employer, the term "labor dispute" was defined broadly to include

[7] See also, *American Mfg. Co.*, 5 N. L. R. B. 443, enforced, 106 F. 2d 61, 67–68 (C. A. 2), affirmed, 309 U. S. 629; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 718 (C. A. 8); *National Labor Relations Board* v. *Western Cartridge Co.*, 139 F. 2d 855, 858 (C. A. 7); *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 284–285 (C. A. 4), certiorari denied, 332 U. S. 758; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *National Labor Relations Board* v. *Remington Rand*, 94 F. 2d 862, 871 (C. A. 2), certiorari denied, 304 U. S. 576; *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 140–141 (C. A. 3), certiorari denied, 322 U. S. 747; *National Labor Relations Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 726 (C. A. 6); *National Labor Relations Board* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 756 (C. A. 6); *United Aircraft Mfg. Co.*, 1 N. L. R. B. 236, 252; *Columbia Pictures Corp.*, 64 N. L. R. B. 490, 514–515.

any dispute involving representation, or terms or conditions of employment, "regardless of whether the disputants stand in the proximate relation of employer and employee" (Section 2 (9)).

(b) *The origins of Section 2 (3) and (9) establish that Congress deliberately intended to extend the protection of Section 7 to employees who engage in sympathetic work stoppages to assist labor organizations in disputes with employers other than their own.*—It was only natural that, in framing a statute which was designed to restrict the power of employers to impede activities in support of collective bargaining, the Congress which drafted the Wagner Act should thus seek to guard against possible restrictions which would have denied the protection of the Act to employees who engaged in sympathetic activities in support of other workers, such as sympathetic strikes, secondary boycotts and refusals to cross picket lines. Whether federal legislation protecting labor's concerted activities extended to such sympathetic action had for years been the core of labor law controversy in this country.

At bottom had been the failure of the courts to recognize that "just as conditions of labor in one shop react upon conditions of labor in another shop of the same craft, so conditions of labor in the craft as a whole influence labor conditions in

other but allied crafts."[8] As a result of the failure to acknowledge the interest of persons employed by other employers in the working conditions of employees engaged in the same industry, the courts, federal as well as state, traditionally enjoined employees from striking in support of their fellows. Congress, long conscious of abuses in issuing such injunctions, endeavored to correct the situation in the Clayton Act. But in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, 472, a majority of this Court held that the Clayton Act did not extend "beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute." See also *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37.

Thereafter, Congress, "to escape the effect of the *Duplex* and *Bedford* decisions, passed the Norris-LaGuardia Act * * *. This congressional purpose found further expression in the Wagner Act * * *." *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 805. The direction in Section 2 (9) of the Wagner Act that the phrase "labor dispute" not be read as limited to cases in which "the disputants stand in the proximate relation of employer and employee" is identical with and was taken from the same language in Section 13 (c) of the Norris-LaGuardia Act (29 U. S. C. 113). See S. Rep. 573, 74th

[8] Frankfurter & Greene, *The Labor Injunction* (1930), p. 216.

Cong., 1st Sess., p. 7. And that language was used for the specific purpose of altering the rule announced in the *Duplex* case. *Allen Bradley* case, *supra*; see also, *United States* v. *Hutcheson*, 312 U. S. 219, 230–231; H. Rep. 669, 72d Cong., 1st Sess., pp. 7–8, 10–11.

In the Norris-LaGuardia Act, the definition of "labor dispute" was designed to describe the area in which the power to grant injunctive relief was withdrawn, and thus to assure that employees could not be enjoined from ceasing work in support of employees of other employers.[9] In the Wagner Act, of course, the definition served a different purpose, namely, to establish the applicability of Section 7, and thereby to assure that

[9] The definition in the Norris-LaGuardia Act of a "case" involving or growing out of a "labor dispute" (Section 13 (a)) confines the area of nonenjoinable conduct to disputes which involve "persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein." Section 13 (b) of that Act defines "person * * * participating or interested in a labor dispute * * *" as anyone who is "engaged in the same industry, trade, craft, or occupation * * * or has a direct or indirect interest therein." In the Wagner Act Congress omitted both of these provisions which in the Norris-LaGuardia Act precede the definition of "labor dispute" (Section 13 (c)), and arguably, therefore, intended that the "industry, trade, craft, or occupation" criterion should not limit the protection accorded under the Wagner Act. It is unnecessary to reach that question in this case, however, for, as we have shown, Waugh was engaged in the very industry involved in the dispute between the Daily Review Corporation and the Typographical Union, and had at least an "indirect interest" therein. *Supra*, pp. 23–24.

employees could not be discharged for such activity. This indeed is the only function served by Section 2 (9). The term "labor dispute" which is there defined appears nowhere in the Act except in Section 2 (3), and there its express purpose is to preserve the employee status of those who cease to work in connection with such a dispute, and thus to protect them against discharge and other reprisal. Manifestly, it was the purpose of Congress, by including these definitions in the Wagner Act, to guarantee that Section 7 of that Act would not be limited, as the Clayton Act was limited, to the particular employer-employee relationship involved in the primary dispute. It is to this that Judge Learned Hand (who, together with Judge Hough, had formed a majority of the court of appeals in the subsequently reversed *Duplex* decision, 252 Fed. 722, 748) referred when he cited this Court's *Duplex* decision and said: "the [Wagner] act has put an end to this" (*Peter Cailler Kohler* case, quoted *supra*, pp. 22–23).

Viewed against the background of this history, it is apparent that Congress intended by the enactment of Section 2 (3) and (9) to extend the same protection against discharge to employees who engaged in sympathetic work stoppages in consequence of disputes to which they were not immediate parties as it extended to employees who stopped work to win concessions from their own employer. Consequently to hold, as did the

court below, that an act of sympathetic assistance is not protected simply because it involves a stoppage or refusal to work is inconsistent with the purposes and objectives of Congress.

If effect be given to the scheme and structure of these statutory provisions, it cannot be that a refusal to cross a picket line is protected when it occurs during nonworking hours, but not when it occurs during working hours. For if the act is of the character protected by Section 7, then the individual who engages in it is entitled to protection against discharge only if, *vis-à-vis* his own employer, he is an "employee" within the meaning of Section 2 (3). *A fortiori* he is entitled to protection when the act of refusal occurs while he is acting as an employee. By the plain words of the section, the fact that his "work has ceased" *pro tanto* as a consequence of his performance of that act can neither impair his status as an employee nor leave him vulnerable to discharge. Indeed, as we have shown, it was precisely to guard against the possibility of a construction which would withdraw the Act's protection from employees whose exercise of Section 7 rights involved refusal to work, that Congress enacted the explicit provisions of Sections 2 (3) and (9).[10]

[10] The fact that the work stoppage here was partial only—i. e., that Waugh did not refuse all work, but merely refused to do a part of his work taking about 10 minutes a day—does not render Sections 2 (a) and (9) inapplicable. If one

(c) *Refusal to cross a picket line for the purpose of assisting a striking union is a traditional, peaceful labor activity of the kind which Congress deliberately intended to protect.*—The court below failed, we believe, to appreciate that Section 7 does not stand alone in the statute, to be construed at large, but that Sections 7 and 2 (3) and 2 (9) and 8 (a) (1) are interlocked and interpenetrating provisions, which must be construed together to accomplish the results envisioned by Congress. Here again the Norris-LaGuardia Act provides a guide. In Section 4 of the Norris-LaGuardia Act (*infra*, p. 72), Congress had spelled out in detail the activities of employees and labor organizations which the federal courts were forbidden to enjoin. It has been authoritatively stated that this specification was designed "only [to] summarize the conventional tactics of organized labor in its effort to improve its material conditions or to make effective in industry those principles of liberty which are axiomatic in our political life."[11]

In the Wagner Act Congress painted with a broader brush. In describing the area of protected conduct, it used such all-embracing terms as to "assist labor organizations," and to "engage in concerted activities" for "other mutual aid or

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who has ceased work altogether remains an employee, surely one whose work has only partly ceased does also. See further, *infra*, pp. 57–65.

[11] Frankfurter and Greene, *The Labor Injunction*, p. 220.

protection" (Section 7). There can be no doubt however, that this description, like that in the Norris-LaGuardia Act, was designed to cover the same ground, namely, to comprehend the "conventional tactics of organized labor."[12] Thus, in place of the Norris-LaGuardia Act's specific protection of "Ceasing or refusing to perform any work or to remain in any relation of employment" (Section 4 (a)), Congress in the Wagner Act embraced all such activity in the phrases "assist" and "concerted activities," elaborating the meaning of those phrases to the extent it deemed such elaboration necessary in Sections 2 (3) and 2 (9). Such parallelism in defining the area of protected activity effectuates the purpose of Congress in the Wagner Act to accord protection against discharge to employees who engage in the conventional and traditional tactics of organized labor, just as in the Norris-LaGuardia Act it immunized such tactics against judicial restraint.

The courts have recognized that both the Norris-LaGuardia Act and the Wagner Act extended protection to employees who, in consequence of a labor dispute involving their employer's customer or supplier, ceased work for their employer entirely, and thereby engaged in

[12] Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346: "Collective bargaining * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

a secondary boycott.[13] *A fortiori*, the protection of those Acts extended to employees who, like Waugh in the instant case, cease work in consequence of such a labor dispute only to the extent required to enable them to respect a picket line.

B. IN AMENDING THE WAGNER ACT TO WITHDRAW PROTECTION FROM EMPLOYEES WHO ENGAGE IN SECONDARY BOYCOTTS, CONGRESS PRESERVED THE PROTECTION ACCORDED TO EMPLOYEES WHO REFUSE TO CROSS LAWFUL PRIMARY PICKET LINES

We have thus far shown that refusal to cross a picket line was not merely embraced by the language of Section 7, but that it is one of the conventional activities of employees in the field of self-organization and collective bargaining which Congress undoubtedly intended to protect, and that Congress indeed took special pains to protect it by the inclusion of the definitions in Section 2 (3) and 2 (9). In amending the Wagner Act in 1947, Congress did not withdraw this protection, but rather confirmed it.

1. *The nature and scope of the restrictions which Congress placed on sympathetic action by labor unions show that Congress intended to continue the Act's protection of employees who refuse, in the course of their employment, to cross primary picket lines.*—The Congress which passed the Taft-Hartley Act concluded that the time had

[13] As to the Norris-La Guardia Act, see *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, 100–103; *Wilson & Co.* v. *Birl*, 105 F. 2d 948, 952 (C. A. 3); as to the Wagner Act, see *National Labor Relations Board* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 506 (C. A. 2).

come to curtail the power of labor organizations to sweep neutral employers into the vortex of labor controversies. (Compare Judge Learned Hand's comment in *Peter Cailler Kohler, supra,* p. 23). It therefore decided to draw a line and to prohibit labor organizations from engaging in sympathetic strike action designed to induce a neutral employer to cease doing business with an employer involved in a labor dispute. But in accomplishing this purpose Congress did not resurrect entirely the philosophy underlying *Duplex Printing Co.* v. *Deering,* 254 U. S. 443. Congress not only left undiminished the list of employee rights specified in Section 7; more significantly, it left intact the statutory definitions of "employee" and "labor dispute," which were intended to overturn the fundamental philosophy of the *Duplex* case. By reenacting these definitions, Congress made it clear that it was not adopting the view that the legitimate interests of employees in the outcome of labor disputes were confined to disputes with their own employer. Rather, in the Taft-Hartley Act, Congress took the view that sympathetic strike action, when carried to the point of seeking to force neutral employers to cease doing business with others, was incompatible with the legitimate business interests of neutral employers and that the public interest in diminishing the spread of industrial strife required that such activities be curbed. Congress met the evil it envisaged, and *pro tanto* limited the scope of

sympathetic concerted activity which had theretofore been protected, by enacting Section 8 (b) (4) (A) to put an end to secondary boycotts. *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 685–687. But the way which Congress chose to restrict the scope of protected sympathetic action, *not* by redefining the rights of employees or the scope of the terms "employee" and "labor dispute," but rather by enacting a new limitation prohibiting certain union action, shows that Congress did not intend to withdraw protection for sympathetic action by employees which does not amount to a secondary boycott as defined by the new Act.

Section 8 (b) (4) (A), by its terms, makes it an unfair labor practice for a labor organization or its agents to engage in or induce employees to engage in "a concerted refusal in the course of their employment * * * to perform any services, where an object thereof is: (A) forcing or requiring any employer * * *. to cease doing business with any other person." Congress did not make it an unfair labor practice for employees to engage in these acts. However, the legislative history indicates that Congress understood that the effect of this prohibition would be to withdraw the protection theretofore enjoyed under the Act from employees who engaged in the proscribed concerted activity.[14]

[14] See the legislative history detailed in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 260–263, n. 15.

At the same time, Congress was careful to preserve the right to strike (*Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 389; *Automobile Workers* v. *O'Brien,* 339 U. S. 454, 457), and the right to bring coercive pressure against the primary employer engaged in a labor dispute, by withholding services and by the peaceful tactics which have traditionally accompanied primary strikes, *e. g.,* picketing. Thus, as this Court has stated, it remains "permissible" under the Act, as amended, for a labor organization to picket an employer with whom it is engaged in a labor dispute so as "to influence * * * employees of a customer * * * not to cross the picket line." *National Labor Relations Board* v. *Denver Building Trades Council,* 341 U. S. 675, 687, referring to *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665. By leaving it permissible for labor organizations to induce employees of customers to refrain from crossing a primary picket line, Congress must have intended to preserve the Act's protection for employees who, yielding to this inducement, refused to cross. Congress accomplished the denial of protection to employees who engage in concerted secondary boycotts by forbidding labor organizations to induce employees to engage in that conduct. Obviously, if Congress had intended to withdraw protection from employees who refuse to cross primary picket lines it would similarly have forbidden labor organizations to induce them

to engage in that conduct. Thus, to hold that employees who refuse to cross primary picket lines are not protected is to hold that permitting inducement has precisely the same effect as prohibiting it. Such a holding denies any significance to the statutory scheme which Congress adopted and obliterates the line which Congress drew between primary activity which it desired to protect and secondary activity which it intended to outlaw. See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 669–671, followed in *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 649 (C. A. D. C.), certiorari denied, 342 U. S. 869; *National Labor Relations Board* v. *Service Trades Chauffeurs, Salesmen & Helpers, Local 145*, 191 F. 2d 65, 67 (C. A. 2); *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F. 2d 645, 652–653

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[15] We are aware that in the *Rice Milling* case, *supra*, this Court explained the exemption of primary picketing which induces employees of other employers to refrain from crossing the picket line on the ground that "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4) * * *." It is true, of course, in this case, just as in the *Rice Milling* case, that the picketing was not aimed at inducing concerted action by Rockaway's employees. Under this approach, as well, the picketing would not be proscribed by Section 8 (b) (4) and Waugh's response thereto would therefore not be beyond the

(C. A. 6).[15] We cannot believe that Congress intended to permit labor organizations to induce employees of customers to refrain from crossing primary picket lines and at the same time intended to deny protection to employees who yield to such inducement. Just as "the legislative history does not sustain a congressional purpose to outlaw secondary boycotts under § 8 (b) (4) and yet in effect to sanction them under § 8 (c)" (*International Bro. of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 704), so the legislative history does not sustain a congressional purpose to protect primary picketing but to destroy its potency by rendering unprotected the normal employee response it is largely designed to evoke.

Furthermore, the fact that Congress in the amended Act incorporated Section 2 (3) and (9) without any modification whatever, demonstrates conclusively, we submit, that Congress intended to continue to protect employees who refuse to cross primary picket lines. For the prohibition of secondary boycotts, and the conse-

[15] (Continued)
bounds of the Act's protection. As we understand it, what this Court held in the *Rice Milling* case is that whether inducement to refrain from crossing a primary picket line is directed at a customer's employees individually or collectively, the sympathetic action which it is designed to evoke is not sufficiently "concerted" to come within the ban of Section 8 (b) (4). It is, of course, however, action in concert with the pickets, within the protection of Section 7, and in any event assists the striking labor organization within the meaning of that Section. See note, 5, *supra*, pp. 21–22.

quent withholding of protection from employees who engage in them, leaves no scope of operation whatever for part of Section 2 (3) or any of Section 2 (9) unless they embrace the refusal of employees to cross primary picket lines. Thus, there is only one situation in which employees, who in concert cease work in consequence of a labor dispute to which neither they nor their employer is a party, do not engage in a prohibited secondary boycott, and that is where their cessation of work is caused by and is limited to refusal to cross a primary picket line. In that situation, their cessation of work is as much a part of the primary dispute as the picket line which induced it; it is no more their object than it is the object of the pickets to induce their employer (the customer) to cease doing business with the picketed employer. Thus, refusal to cross a picket line remains under the amended Act a permissible and protected act of assistance and a concerted activity for mutual aid when performed in connection with a primary strike.

2. *Specific provisions added by the amended Act reveal Congress' understanding that refusal to cross a primary picket line remains protected.*—This conclusion, moreover, is reinforced by the specific provisions of the amended Act. Congress wrote a special provision to assure that its prohibition of secondary boycotts should not be read as diminishing the right of employees to respect picket lines under the circumstances here

present. The final proviso to Section 8 (b) (4) declares that—

> nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

This proviso demonstrates that Congress did not intend that its ban of secondary boycotts should result in denying the protection of Section 7 to individuals who refused to cross primary picket lines and to that extent only refuse to render service to their own employer. Furthermore, since the proviso is attached to a provision which prohibits only a refusal to perform services "in the course of [his] employment" (Section 8 (b) (4), initial clause) there can be no suggestion that the only refusals which Congress thus protected, were those which occurred outside of working hours and therefore involved no refusal to perform services at all.[16]

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[16] Respondent argued in the court below that to read the proviso as protecting employees who refuse to cross picket lines under the circumstances therein detailed would cast upon the employer the burden of determining whether the primary strike satisfied the requisites of the proviso. In the first place we do not believe that the right to refuse to cross primary picket lines is necessarily limited to situations which fall within the terms of the proviso. We do say that inclu-

Final proof that Congress intended in the Taft-Hartley Act to protect refusal during working hours to cross a picket line lies in the scope of the new "right" created in Section 7 of that Act—the right *to refrain from* activities protected by Section 7. In the original Wagner Act, Section 7 spelled out the rights of employees to assist labor organizations, to engage in concerted activities, *etc.*, and Section 8 (1) forbade employers to interfere with those rights. In the Taft-Hartley Act, however, Congress added to the "rights" contained in Section 7 "the right to refrain from any or all of such activities," and thus guaranteed the right *not* to assist labor organizations or to engage in concerted activities, *etc.* Congress then implemented that right by enacting Section 8 (b) (1) (A), which forbids a labor organization to restrain or coerce employees in the exercise of their rights. As stated

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sion of the proviso is one of several indications that Congress was intent upon retaining protection of the right to refuse to cross picket lines, and that, even standing alone, the proviso protects such refusals, to the extent that the requirements of the proviso are met, as they were in this case. Even assuming that the protection is as narrow as the proviso, it cannot be relevant that the effect of according that protection is to require an employer who desires to discharge an employee for refusing to cross a picket line to ascertain whether or not the conditions which establish protection are present. To hold, in accordance with respondent's view, that an employer may discharge an employee for his assistance to another union regardless of whether the conditions envisioned by the proviso are met, is to destroy entirely the protection granted by the proviso.

by Senator Taft in his analysis of the Act, Congress intended to "make the prohibition contained in section 8 (b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." 93 Cong. Rec. 6859; 2 Leg. Hist. 1623. This Court similarly recognized in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672, that Sections 7 and 8 (b) (1) (A) protect employees who desire to cross picket lines from restraint and coercion at the hands of labor organizations. The Board has consistently so held."[17]

But if—as Congress intended and this Court and the Board have held—the amended Act protects employees against coercion by unions which seek to compel them to respect picket lines, the statutory warrant for this protection can only be found in that part of Section 7 which guarantees "the right to refrain from" the activities protected by that Section. In other words, the right to cross a picket line free from union coercion is protected only because its converse, the right *not* to cross, is protected against employer coercion. In the instant case, had Waugh determined to cross the picket line, the striking union, had it coerced him into respecting the line, would

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[17] *Medford Building Trades Council*, 96 N. L. R. B. 165, 166, n. 3, 176; *International Longshoremen's Union*, 79 N. L. R. B. 1487, 1504; *United Construction Workers*, 94 N. L. R. B. 1731, 1733.

have violated Section 8 (b) (1) (A) by restraining the exercise of his right not to assist the union or engage in concerted activities. The statute protects the employee's freedom to choose whether or not to assist the union; Waugh in choosing to assist it was protected against respondent's reprisal, as he would have been protected against union reprisal had he chosen to exercise his converse right.

In sum, analysis of the Taft-Hartley Act shows Congress' intent that the form of assistance and concerted activity undertaken by Waugh in this case should continue to enjoy the protection of the Act. The retention of the broad definitions of "employee" and "labor dispute," the method adopted to limit the precise kind of sympathetic concerted activity which Congress desired to discourage, the terms of the proviso to Section 8 (b) (4), the continued protection of primary picketing, the scope of the correlative right newly conferred by Section 7, as amended, to refrain from assisting a union or engaging in concerted action, all reveal Congress' understanding that the Act protects employees who in the course of their employment refuse to cross a lawful picket line.

C. THE REASONS ADVANCED BY THE COURT BELOW FOR CONCLUDING THAT THE STATUTE DOES NOT PROTECT REFUSAL TO CROSS A PRIMARY PICKET LINE DURING WORKING HOURS ARE UNSOUND

For the reasons already indicated, we believe that Congress itself has struck the balance be-

tween the right of employees who are not immediate parties to a dispute with their own employer to engage in sympathetic action in support of other striking unions on the one hand, and the right of such neutral employers to be relieved of strike pressure designed to force them to cease doing business with other employers on the other. While limiting the right of employees to engage in secondary strike action, Congress decided that the right of employees to refuse to cross primary picket lines should be preserved and protected, and in doing so we believe it necessarily intended that the exercise of that right during working hours be protected. The court below, however, viewed the question under what circumstances protection should be accorded to employee refusals to cross primary picket lines as one which Congress had left open, and which the Board and the courts were therefore free to decide on the basis of their own balancing of the competing considerations. We believe that even on this assumption the court below erred in denying any protection to such a refusal occurring during working hours, for the considerations upon which it predicated its conclusion are inapplicable and inappropriate to the resolution of this question.

1. *The distinction between working and nonworking time cannot be applied to the right to refuse to cross picket lines.*—To support its theory that the protection which Section 7 extends

to employees who respect picket lines is limited to those who exercise that right outside working hours, the court below relied on this Court's observation in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, that the rights protected by Section 7 "are not unlimited" and on the Board's holding in *Peyton Packing Co.*, 49 NLRB 828, 843, approved in the *Republic Aviation* case, that solicitation of union membership may, absent special circumstances, be prohibited during working hours. We submit that the court below misconstrued and misapplied the *Republic* case, and that the very reasons which underlie the rule as to solicitation of union membership require reversal of the decision below.

In the *Republic* case, this Court recognized that the rights guaranteed employees by the Act were meaningless unless the Act also assured adequate opportunity to exercise them. In determining how far organizational opportunity should be extended it was pertinent, of course, to consider the impact of such extension upon competing interests of the employer. "Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U. S., at 798. In the *Republic* case the Court approved the Board's determination that, insofar as the right to solicit union membership on the employer's property is concerned, the balance is appropriately struck by permitting solicitation during non-working time while disallowing it during working

time. Since there would ordinarily be ample opportunity to engage in organizational activity outside of working hours, both on and off the employer's premises, this resolution of the conflicting interests was thought to give full protection to the right to organize which the Act was intended to protect and foster.

However, to impose the "same limitations" upon the very different right to refuse to cross primary picket lines, as the court below did (R. 76), is to destroy virtually any opportunity to exercise that right, and thereby to repudiate the basic principle which the *Republic* case vindicates. That case clearly was not intended to draw a universally applicable "distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time" (R. 76). A strike, for example, necessarily involves violation of the employer's rules; yet it would hardly be suggested that the right to strike is protected only if it is exercised outside working hours. The right, as an employee, to respect a primary picket line is analogous, in this respect, to the right to strike and in sharp contrast to the right to solicit union membership, in that it can ordinarily be exercised only during working hours. Indeed, unless the employee's right to respect picket lines is protected when exercised during working hours, it is not protected by the Act at all (see p. 32, *supra*), for when employees respect picket lines

outside of working hours they act not in their capacity as "employees" but only as consumers. Correlatively, the right of the picketers "to influence employees of a customer * * * not to cross the picket line" *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687, would be nugatory if employees could be discharged for responding, *as employees*, to such inducements.

Accordingly, if the Act protects refusals to cross primary picket lines, that protection, like the protection extended to strikes and other concerted activities, must exist when the refusals, like the strikes, occur during working hours.[18] Of course, a refusal to cross a picket line during working hours may entail disobedience of the employer's instructions, and interfere to some extent with the employer's business. Similar, and far more drastic, consequences attend a strike, but it has never been held that they warrant denial of the Act's protection to strikers. See *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (C. A. 5); *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3). In strike cases, where the employee's statutory right can

[18] Cf. *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3); *Olin Industries, Inc.*, v. *National Labor Relations Board*, 191 F. 2d 613, 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717–718 (C. A. 8).

effectively be exercised only during working hours, and the exercise necessarily involves interruption of the employer's business, it has long been settled that the conflicting interests are to be reconciled by permitting the employer to continue production by replacing the recalcitrant employees, but precluding him from severing their employment until they have been replaced. *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345–346; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C. A. 9), and cases cited therein. As the court observed in the *Globe* case, "the authorities uniformly hold that the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice." Such a resolution of the conflicting interests, which has become well settled in cases where the exercise of employee rights results in a total stoppage of work, would seem, *a fortiori*, to afford the maximum protection to which the employer is entitled where the exercise results in only a partial cessation of work."[19]

Consequently, the Board, applying the principles laid down in the *Republic* case, while recognizing that employees have the statutory right to assist a striking labor organization by refusing to cross its picket lines, but also recognizing that the employer has a right to continue production, concluded that these rights could best be mutually

[19] Cases cited, note 18, *supra*, p. 49. See also, 66 Harv. L. Rev. 363–365; 52 Col. L. Rev. 934–936.

accommodated by protecting the employee from discharge but permitting the employer to replace him, precisely as in the case of an economic striker.[20] The court below misapplied the principles of the *Republic* case; instead of preserving and accommodating the conflicting rights, the court below resolved the issue by limiting the employee's free exercise of his right to non-working hours. In this context, unlike the "solicitation" context of the *Republic* case, such a limitation virtually extinguishes the employee's right.

2. *The court below failed to appreciate the rationale and the applicability of the settled distinction between replacement and discharge of employees who occupy the legal status of economic strikers.*—The Board recognized that respondent was under no obligation to permit Waugh to work at all as long as he refused to cross the picket line. This was because, in the Board's view, by refusing to cross the picket line Waugh had placed himself in the same legal status as an economic striker to whom the employer is under no obligation to offer work unless and until the striker waives his demands and offers unconditionally to return to work on the

[20] The term "economic striker" is used in this brief to describe an employee who goes on strike solely to further a legitimate economic objective, in contra-distinction to an "unfair labor practice striker" who strikes to protest an unfair labor practice.

employer's terms.[21] The Board also held that whether or not respondent elected to refuse to permit Waugh to work at all as long as he refused to cross the picket line, it was free to replace him until he abandoned his refusal, but it was not free to discharge him until he had been replaced.

In describing as "wholly unrealistic" (R. 78) this distinction between an employer's right to discharge an employee who is engaged in a protected concerted activity and the right to replace him, the court below held inapplicable a doctrine long settled and uniformly applied in the case of economic strikers.[22] The reason for the rule finds its roots in the fundamental policy of the Act: an employee has the right to engage in concerted activities, and the employer may not inhibit the exercise of that right by punishing the employee with discharge, thereby signifying to all his employees that their employer will visit immediate and drastic consequences on their attempts to exercise their statutory rights. The employer's right to replace an economic striker exists because the employer has a right to continue production, and because the replacement is made for that

[21] *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (C. A. 9).

[22] The Ninth Circuit in the *Globe Wireless* case, *supra*, 193 F. 2d, at 750, observed that "the authorities uniformly [so] hold," and cited seven of what it termed "the numerous * * * holdings to this effect."

purpose rather than for the purpose of intimidating employees in the exercise of their rights.

This distinction between replacing and discharging an economic striker has important practical consequences to the striker himself. As a striker he continues to be an "employee" within the meaning of Section 2 (3) of the Act, and is entitled to be reinstated if he has not been replaced. Consequently he may at any time prior to replacement abandon his strike and be assured of his job. This protection is necessarily inherent in the employee's initial exercise of his right to strike, for the Act's guarantee of the right to engage in concerted activity, and the preservation of his status as an employee (Section 2 (3)), would be meaningless if the exercise of the right could be met with immediate discharge.[23] Moreover, the effect of the discharge is to notify the employee that he will not be reinstated, thus encouraging him to prolong rather than to abandon the strike, a result hardly consistent with the express purposes of the Act.

It is no less "realistic" and important to apply the distinction between discharge and replacement to an employee who refuses to cross a primary picket line, than to an economic striker. Just as the distinction affords the economic striker an opportunity to terminate the strike before he is

[23] *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (C. A. 5).

replaced, so it affords the employee an opportunity to abandon his refusal to cross the picket line before his employer has hired a replacement. In one case, as in the other, this opportunity for the employee to preserve his job by terminating his work stoppage before replacement, is an indispensable element in the protection which the Act accords to the exercise of the rights it safeguards.

3. *The court below failed to perceive the distinction between the lawful conduct of supporting a primary strike by refusing to cross a picket line at the plant of the struck employer and the unlawful conduct of engaging in a secondary boycott.*—The court below professed itself unable to "follow the Board's reasoning" that respondent could have treated Waugh as a striker, arguing that if Waugh had gone on strike to prevent his employer from dealing with the picketed Daily Review plant, Waugh's union could not have supported his strike without violating Section 8 (b) (4) of the Act. (R. 77–78). Even if this were so, it would not make a strike by Waugh unlawful. Moreover, contrary to the assumption of the court below, it may well be that under the proviso to Section 8 (b) (4) Waugh's union could legitimately have urged its members to join Waugh in refusing to cross the primary picket line at the Daily Review plant,

just as the Typographical Union could lawfully have urged the employees of Rockaway to do so, although neither union could lawfully have urged them to strike against Rockaway News. Thus, although the Board has not yet construed the proviso, the proviso may permit a labor organization to induce or encourage its members to refrain from crossing a primary picket line authorized by another labor organization entitled to recognition at the premises of another employer. And this result may follow, in any event, from the distinction which Congress drew in Section 8 (b) (4) between primary and secondary strike activity. Cf. *Newspaper and Mail Deliverers' Union, etc.*, 90 N. L. R. B. 2135, 2146–2149. Thus, it may be that under Section 8 (b) (4), Waugh's union would not have violated the Act had it encouraged its members to support Waugh by respecting the picket line as he did.[24]

The failure of the court below to consider these aspects of Section 8 (b) (4) led the court mistakenly to assume that "it is inconceivable that Waugh could have won his strike" (R. 78). Obviously, if all of Waugh's fellow workers could have been persuaded, either by their own union or by the pickets, to refrain from crossing the

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24/ (See next page).

Daily Review picket line, Rockaway News might well have been unwilling or unable to replace them all, and therefore have permitted the employees to continue work while respecting the picket line. Since lending this assistance to the Typographical Union was the only goal of Waugh's "strike," it is therefore by no means "inconceivable" that Waugh could have won it.

Moreover, even assuming that Waugh's "strike" was foredoomed to failure, this would afford no basis for denying him the protection of the Act. The potential success of assistance which an employee offers a labor organization is no more a permissible criterion of the Act's protection than is the potential success of a strike a permissible criterion of the protection accorded the striker. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344.

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[24] To be sure, respondent could lawfully have converted such a limited refusal to perform services into a complete work stoppage by denying Waugh and any other employees who respected the picket line the opportunity to perform those other duties they were willing to perform. But in such event the resultant work stoppage would not have been a "concerted *refusal* * * * to perform * * * services" within the meaning of Section 8 (b) (4), for the only service the employees would be *refusing* to perform would be that specifically protected by the proviso. Moreover, although the employer may refuse to permit employees to perform services they are willing to perform, he cannot thereby transform their lawful object—a refusal to cross a picket line—into an unlawful one.

4. *The court below failed to appreciate that the purpose of an employee who refuses to cross a picket line at the plant of his employer's customer is to lend assistance to the strikers, and not unilaterally to "dictate the terms of his employment."*—As additional support for its view that the statutory protection of the right to respect picket lines exists only outside working hours, the court below stated that "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do" (R. 76). This contention, as we shall now show, rests both upon a misconception of the objective which underlies employee refusals to cross picket lines, and upon a misreading of the so-called "partial strike" cases relied on by the court below.

The employee who voluntarily refuses to cross a picket line does so, not in order to change or "dictate the terms of his employment," but to assist the picketing union (pp. 19–24, *supra*). His goal is the same as it would be if, as a consumer outside working hours, he similarly refused to cross a picket line. When the refusal occurs during working hours, it entails non-performance of a part of his duties. But this is a consequence, not an aim of his conduct. For this reason cases like *Conn* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), upon which the court

below relied, are wholly inapposite. In the *Conn* case, employees whose demand for overtime pay had been rejected simply walked out of the plant at their usual quitting time though they had been scheduled to work overtime. They returned to work the following morning, but there was evidence that they intended to follow the same course each evening until their request was granted. Holding that the discharge of these employees was not violative of the Act, the court said (108 F. 2d, at 397):

> We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.

This language and the facts to which it relates demonstrate the error of the court below in relying upon the *Conn* case here. The factor of importance in *Conn* was that the employees, by unilaterally fixing their hours of employment, sought to arrogate to themselves the employer's right

to manage his business. They had a right to demand that the employer exercise his managerial rights in accordance with their desires; they could have struck to enforce their demand. But the employer had a right to resist. And when their concerted action consisted of an attempt to run the business as they saw fit—as if their rejected demand had been granted—the court concluded that the employer could defend his managerial rights by discharging them.

That the *Conn* decision was not intended to lay down a rule that an employee's refusal to perform some of the duties assigned to him cannot be a protected activity is made clear by the same court's decision written by Mr. Justice (then Judge) Minton in *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 460–461 (C. A. 7), certiorari denied, 317 U. S. 650. There, persons employed as laboratory assistants were asked to work in the company's factory during a strike of the factory employees. Though they were not members of the striking union, the laboratory assistants refused to act as "strikebreakers" by performing the factory duties the company had asked them to assume. Like Waugh in the instant case, they did not walk off the job or formally "strike" in the sense of being unwilling to work at all. Nevertheless, although their action amounted to what the court below would term an attempt "unilaterally to dictate the terms of [their] employment," the court whose *Conn* deci-

sion is invoked for this suggestion had no hesitation in finding that their discharge was an unlawful reprisal "because of their sympathy for the union."

The similarity of the instant case to *Rapid Roller Co.* and its decisive difference from *Conn* are, we believe, plain. Here, as in the *Rapid Roller* case, the employee withheld his labor to the extent necessary to give his support to and demonstrate his "sympathy for the union." Here, unlike *Conn*, there was no attempt to usurp management's right to run its business. Waugh sought no change, by his refusal to cross the picket line, of his own terms of employment. The elimination of part of his duties was in no sense an objective in itself. His "strike" was "partial" only because of the fact that his respect for the picket line affected only part of his work. This fortuitous circumstance affords no basis for denial of the protection Waugh would have received had the picket line been so situated as to cause his complete cessation of work. See *Cyril de Cordova & Bro.*, 91 N. L. R. B. 1121, 1135–1137.[25]

[25] The court below also relied on two Eighth Circuit cases, *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496, and *National Labor Relations Board* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108. Neither case is in point. In *Kopman*, as in *Conn*, the employee in refusing to perform certain work was in fact attempting to prescribe the terms on which he would work. In *Montgomery Ward*, the employer told the employees who refused to work on "struck" goods that they would have to do the work or leave the plant, *i. e.*, assume the position of

Nothing in the Act suggests that a "partial strike" merely because it is "partial" forfeits statutory protection. On the contrary, the Act's paramount objective—"to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred" (Sec. 1, Wagner Act)—is best served wherever the paralyzing effects of work stoppages can be minimized or eliminated. In the absence of circumstances which for some other reason warrant withdrawal of the Act's guarantees, there is nothing to the suggestion that an employee's cessation of work is unprotected unless it amounts to a "strike" in the standard sense of the word.

In *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3), where such a suggestion was made, it was shortly and decisively rejected. Approving the Board's decision that employees were protected against discharge for conducting a work stoppage during working hours in order to present grievances to their employer, the court said (182 F. 2d 819):

> * * * That the employees suddenly dropped their tools and insisted upon presenting their grievances during working hours does not detract from the lawfulness

full-fledged strikers. Only when they refused both alternatives were they discharged. 157 F. 2d, at 496. Respondent here summarily discharged the employee without giving him the alternative of being treated as an economic striker.

> of their conduct. Certainly the statute would have protected them against interference or coercion if instead of insisting upon immediate discussion of their demands they had then and there left the plant and formed a picket line outside. *In fact, what the workmen did was more reasonable and less productive of loss to all concerned than an outright strike.*
>
> The language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike. [Italics added.]

To hold that workers must cease work altogether and engage in a "total" strike in order to be protected by Section 7 would not only rewrite the statute and thwart Congress' policies, but would lead to palpably absurd results in at least some cases. For example, it is well known that in such industries as steel manufacturing, preservation of life and property demands that plants be manned for emergency operations during a strike.[26] If, in recognition of this need, strikers remain at work to perform only the tasks necessary to preserve the plant and avoid human injury, it could scarcely be said that such employees should be denied the protection of the Act because they are "partial" strikers. Con-

[26] See *Albrecht* v. *National Labor Relations Board*, 181 F 2d 652 (C. A. 7).

doning the discharge of these employees on the ground that they ought to have deserted the plant entirely would sacrifice obvious considerations of practical sense to the baseless supposition that Congress intended to foster all-out industrial warfare.

We submit, in short, that the view that partial cessations of work are necessarily unprotected by the Act is without substance. If anything, the precisely contrary view would have far more merit, for Section 7 literally covers all forms of assistance to labor organizations and other concerted activities. The fact is, however, that the extent of a work stoppage can never, by itself, be determinative of its protected or non-protected character under the Act. Thus, a "total" strike, like a "partial" strike, may be unprotected because it is in breach of contract [27] or is other-

[27] *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332. Respondent contended in the court below that Waugh's refusal to cross the picket line violated the "no-strike" clause in respondent's contract with Waugh's union. The argument falls for several reasons. First, the contract itself was set aside in its entirety as invalid by the Board—properly, as the decree in *Gaynor News*, *supra*, establishes. See p. 8, n. 2, *supra*. Second, the proceedings of the Arbitration Board to which Waugh's union complained in his behalf, establish that that Board viewed Waugh as violating not the "no-strike" clause (Section 19–n of the contract) but only Section 4 dealing with the right of foremen to issue orders (R. 69, 25–26). Indeed, it seems clear that Waugh did not violate the "no-strike" clause, which provided that "no strikes * * * shall be ordered or sanctioned by any party hereto" (R. 61), for that clause refers only to strikes

wise unlawful [28]—or because it constitutes so gross a departure from the duties of employees to both their employer and the public as to justify withdrawal of the normal safeguards against employer reprisals for concerted activities.[29] The question in every case is, not whether the employees have wholly abandoned their work, but whether the "particular activity was so indefensi-

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against Rockaway News and does not refer to refusals by employees individually to cross picket lines at the plant of other employers, refusals which have no purpose to gain concessions from Rockaway News.

Respondent also contended below (1) that the failure of the contract to contain a clause, once proposed during the contract negotiations, expressly recognizing the right to respect a picket line shows that the right was waived, and (2) that the determination of the Arbitration Board rejecting Waugh's grievance was binding. However, the silence of the contract on the right to cross a picket line cannot be construed as a waiver of a right created by statute, and under Section 10 (a) of the Act the Board's exclusive power to prevent unfair labor practices cannot be "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." See *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262 (C. A. 3), as modified, 120 F. 2d 266, certiorari denied, 314 U. S. 693; *National Labor Relations Board* v. *Walt Disney Products*, 146 F. 2d 44, 47–48 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board* v. *International Union, etc., Local 291*, 194 F. 2d 698, 702 (C. A. 7).

[28] *E. g., National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31.

[29] *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C. A. 7); *Underwood Machinery Co.*, 74 N. L. R. B. 641, 646.

ble, under the circumstances, as to warrant" the employer's infliction of penalties therefor.[30]

Here, the answer to this question is a simple one. Far from being an attempt to usurp management's rights or from being in any other respect remotely describable as "indefensible," Waugh's refusal to cross a picket line was a normal, traditional, expectable method of acting to assist the strikers.[31] The fact that this required his refusal to perform only a five- or ten-minute portion of his daily duties would appear to have made his action less troublesome to respondent than a total cessation of work. Far from being an attempt "unilaterally to dictate the terms of his employment" (R. 76) Waugh's action represented only the traditional means by which a union man assists a striking union and makes common cause

[30] The quoted language, from *Harnischfeger Corp.*, 9 N. L. R. B. 676, 686, is part of a passage quoted, with apparent approval, in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 256.

[31] Insofar as the protected character of the activity is concerned, the traditional, legitimately motivated refusal to cross a picket line which is here involved is to be contrasted with the "recurrent or intermittent unannounced stoppage of work to win unstated ends," a "new technique for bringing pressure on the employer" which this Court held unprotected in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 249, 264.

with the strikers. As such it falls squarely within the protection of Section 7 of the Act.[32]

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed, and the decision of the Board enforced.

Respectfully submitted.

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DECEMBER 1952.

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[32] Respondent's discharge of Waugh for assisting the striking Typographical Union lessened that Union's chances of prevailing in its strike and thus discouraged membership therein in violation of Section 8 (a) (3). Moreover, the Board's order directing Waugh's reinstatement with back pay is appropriate even if the discharge be viewed as violating only Section 8 (a) (1). *National Labor Relations Board* v. *Vail Mfg. Co.*, 158 F. 2d 664, 667 (C. A. 7), certiorari denied, 331 U. S. 835; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 502 (C. A. 5).

APPENDIX

The relevant provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141 *et seq.*), are as follows: [1]

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

[1] The provisions of the original Act here reprinted were reenacted in the amended Act with certain additions. The added phrases are here printed in italics except for Section 8 (b) which appears only in the amended Act. Phrases omitted from the amended Act are printed in brackets.

conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*

Unfair Labor Practices

SEC. 8. (*a*) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(*b*)[2] It shall be an unfair labor practice for a labor organization or its agents—

[2] All of Section 8 (b) was created by the amended Act.

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to

recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power [shall be exclusive, and] shall not be affected by any other means of adjustment or prevention that has been or may be estab-

lished by agreement, [code,] law, or otherwise * * *.

* * * * *

(c) * * * If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action [,] including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board [as to the facts,] *with respect to questions of fact* if supported by *substantial* evidence[,] *on the record considered as a whole* shall be conclusive.

The relevant provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101, *et seq.*), are as follows:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified; regardless of any such undertaking or promise as is described in section 3 of this Act.

* * * * *

SEC. 13. When used in this Act, and for the purposes of this Act—

* * * * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

U. S. GOVERNMENT PRINTING OFFICE: 1952

DEC 20 1952

IN THE

Supreme Court of the United States

October Term, 1952

No. 318

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, AS *AMICUS CURIAE* ON BEHALF OF THE PETITIONER

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

Sec. 2 (3) 13, 27
2 (9) 27
7 ..... 4, 5, 6, 8, 9, 10, 12, 13, 16, 19, 27
8 (a) (1) 2, 4, 8, 9, 10, 28
8 (a) (3) 2, 4, 8, 28
8 (b) 9, 28
8 (b) (1) 28
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10 (a) 30
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10 (e) 31

MISCELLANEOUS:

Immunity from Discharge for Refusal to Cross a Picket Line, Columbia Law Review, Vol. 52, No. 7, pp. 934-936 (November, 1952) ..... 17 fn.

IN THE

Supreme Court of the United States

October Term, 1952

No. 318

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, AS *AMICUS CURIAE* ON BEHALF OF THE PETITIONER

The Solicitor General, on behalf of the National Labor Relations Board, prayed that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on May 12, 1952 (R. A. 15-21, 23),[1] denying enforcement of an order issued by the Board against Rockaway News Supply Co., Inc. This Court granted certiorari to review on October 27th, 1952.

[1] For purposes of this brief, the printed record before this Court consists of two separately paginated volumes: the appendix to respondent's brief in the court below, herein designated "R. A.," and the appendix to the Board's brief in the court below, designated "B. A." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief

Opinions Below

The majority and dissenting opinions of the Court of Appeals (R. A. 15-21, 21-22) are reported at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 7-36) are reported at 95 NLRB 336.

Jurisdiction

The judgment of the Court of Appeals was entered on May 12, 1952 (R. A. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

Question Presented

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are set forth in Appendix, *infra*, pp. 27-31.

Statement

1. The Facts

The facts, as found in the findings of fact, conclusions of law, and order of the Board dated July 20, 1951, (B. A. 7-36), are not in dispute. Rockaway News Supply Co., Inc. had in its employ one Charles Waugh whom it had used

as a steady chauffeur and routeman for about seven years preceding March 7, 1950. Waugh was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, the exclusive bargaining representative for delivery department employees of Rockaway (B. A. 19; 40, 49, 56-60). For five scheduled days of the week, from 9:45 A. M. to 6:30 P. M., Waugh's assignment was to drive a truck along a fixed route picking up and delivering newspapers and other periodicals (B. A. 20; 42-43). On every working weekday Waugh would stop at the plant of the Daily Review Corporation, Rockville Centre, Long Island, New York, to pick up bundles of the Nassau Daily Review Star and deliver them further along his route. The pickup operation consumed ten minutes of the working day and was performed in the morning (B. A. 20; 42, 43, 47, 49). Before beginning work on Thursday, March 2, 1950, Waugh was advised that the Nassau County Typographical Union had established a picket line around the premises of the Daily Review Corporation (B. A. 20-44). On reporting for work that morning Waugh spoke to his foreman and informed him that he "as a Union man, would not cross that Union picket line and thereby become a scab or a strike-breaker" (B. A. 20; 45). The foreman, while stating that Waugh's decision might cost Waugh his job, acquiesced to Waugh's suggestion and arranged to have the Daily Review's newspapers brought to Rockaway's plant so that Waugh could pick them up there rather than at the struck plant (B. A. 20-21; 35, 46).

Substantially the same arrangement was followed on Friday, March 3rd, 1950 (B. A. 21; 46-47). However, on Tuesday, March 7th, Waugh's next work day, the foreman told Waugh that this time he would have to cross the picket

line in front of the Daily Review Corporation's plant or else suffer discharge (B. A. 21; 47-48). Waugh reiterated his refusal to cross the picket line and left his employer's premises (B. A. 21; 48).

Waugh reported for work the following day but was informed that he had been fired. Every day thereafter, for about three weeks, Waugh turned up at Rockaway's plant to request work but each such application was denied by his employer (B. A. 21; 48-49). Waugh's discharge was made the subject of a grievance before an arbitration panel, under the terms of the collective bargaining agreement between Rockaway and Newspaper and Mail Deliverers' Union of New York and Vicinity (R. A. 12-13), and the arbitration panel ruled that Waugh had been justifiably discharged for refusal to obey the foreman's orders as required by the contract (R. A. 10-11, B. A. 25-26).

2. The Action of the Board

The Board in its conclusions and order held that Waugh's refusal to cross the picket line was an exercise of a right guaranteed by Section 7 of the Act and that the employer's discharge of Waugh therefore violated Section 8 (a) (1) and (3) of the Act (B. A. 8-10, 28-30).

The Board also found that the picket line thrown up by the Typographical Union outside the plant of the Daily Review Corporation was legitimate and that Waugh's activity, in refusing to cross the line, was in concert with the Typographers, notwithstanding the fact that Waugh was not a member of that Union (B. A. 9-10). Further, the Board concluded that Waugh's refusal to cross the picket line was not motivated by any desire or wish to be insubordinate or unilaterally "to impose or alter his own condi-

tions of employment while remaining at work" but rather an exercise of his statutory right to engage in a form of concerted activity dictated by a deeply ingrained principle of the labor movement (B. A. 8-9). Although the Board found that Waugh's summary discharge was an unfair labor practice, it charted a course for the employer by saying "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

The Board countered respondent's argument that Waugh's conduct had constituted a breach of the collective bargaining agreement between the employer and Waugh's Union, and was so adjudicated by the arbitration panel acting under that contract, by citing its former order[2] outlawing the identical contract in its entirety because it contained an unlawful union-security clause (B. A. 8, 30-32).

The Board thereupon entered its cease and desist order directing the reinstatement of Waugh with back pay (B. A. 10-14).

3. The Decision of the Court Below

The Court below, in setting aside the order of the Board, first summarized the facts of the case, then stated that "this case squarely presents the question whether it is an unfair labor practice for an employer to discharge an employee who refuses to obey the employer's orders to perform that part of his regular daily duties which involve his crossing the picket line of another union than his own at

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[2] *Rockaway News Supply Company, Inc.*, 94 NLRB 1056 (1951).

another plant than that of his employer." The majority agreed that Waugh's act of refusal to cross the picket line was an exercise of "'the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection,' which is expressly guaranteed by Section 7 of the Act."

The majority recognized that the refusal to cross a picket line, so habitual with union members, was an act of assistance to the labor organization conducting the picketing and was directed to mutual aid or protection (R. A. 17).

Nevertheless, the Court held that although the act of refusing to cross a picket line was a right guaranteed by Section 7 of the Act, it was not an unlimited right, but one to be reconciled with the right of employers by reasonable rules to govern the conduct of employees during working time. Since there was binding authority that an employer could promulgate rules, enforceable by discharge, prohibiting union solicitation on company premises during working time, it followed, reasoned the Court, that the right to refuse to cross another union's picket line at another plant being "* * * of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member * * *" should be subject to the same limitations. Hence, the right to refuse to cross the picket line of another union at another plant was protected by the Act only when the refusal occurred on the employee's own time. Where the refusal occurred, as here, during the employee's working hours, the employee could be discharged by his employer with impunity, for otherwise the employee could unilaterally dictate the terms of his employment (R. A. 18).

The court below described the decision of the Board, to the effect that the employer instead of summarily discharging the employee, could have required the employer either to perform all of his duties or vacate his job as a striker leaving himself open to replacement, as unrealistic. For, said the court, if Waugh had gone on strike and had his union supported him, such a strike would have become a secondary strike outlawed by Section 8 (b) (4) of the Labor Management Relations Act of 1947 and, while Waugh's individual action was not a violation of the Act, it was still a violation of his individual obligation to his employer, and consequently a proper basis for his discharge. Further, such an individual unassisted strike could not conceivably be won.

Finally, the Court noted that the chief object of Waugh's concern seemed to be with his own standing as a union man rather than that of helping the Typographical Union.

National Labor Relations Board v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir. 1951) certiorari denied, 342 U. S. 885 was cited as authoritative support for the instant decision upon allegedly substantially similar facts.

Judge Clark dissented, observing that the proviso contained in Section 8 (b) (4), with respect to picket lines was not to be encroached upon by implication and that the analogy of the limitation of union solicitation on working time should not have been applied to restrict "this explicit and unlimited exception of the 1947 Act to *only non-working hours.*" This, the dissenting Judge noted, was a practical nullification of the proviso (R. A. 22). He was also of the opinion that the question of breach of a collective bargaining agreement had been properly removed from the

case and that the Board's decision as to the applicability of the rules governing the rights of economic strikers and their employers was well grounded in authority.

Specification of Errors to Be Urged

The Court below erred:

(1) In holding that an employer does not violate Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own.

(2) In holding that an employee is protected by Sections 7 and 8 (a) (1) of the Act for refusing to cross a lawful picket line of a labor organization of which he is not a member at the premises of an employer other than his own only when such refusal occurs during the employees' non-working hours.

Summary of Argument

The Court below was unanimous in holding that the act of an employee in refusing to cross the lawful picket line of another union at another plant was the exercise of a right to engage in concerted activities to assist labor organizations for the purpose of mutual aid or protection expressly guaranteed by Section 7 of the Act. However, the authority[3] chiefly relied upon by the majority of the

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[3] *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir.), certiorari denied, 342 U. S. 885.

Court below laid great stress upon the premise that such a refusal was factually not activity protected by Section 7 of the Act. Manifestly when an employee respects the picket line of another union he is aiding and assisting the picketing employees and their union. Ultimately, the solidarity which he has shown with the pickets will rebound to his benefit when and if he is in need of the solidarity and protection afforded by others in the labor movement.

The Act, in its definitions, takes care to extend the scope of interested parties who are to receive its benefits beyond the limits of those standing in strict employer-employee relationships. Factually there is a demonstrable unity of interest amongst employees generally and any activity which descriptively falls within the purview of Section 7 of the Act is guaranteed the protection of that Section and by the invocation of Section 8 (a) (1), except as it may be limited elsewhere in the Act.

There was a valid labor dispute here involving conditions of employment at the plant of the Daily Review Corporation. By refusing to cross a picket line, Waugh made himself a party to the dispute in acting in concert with the pickets against their employer. His own interest was a direct one, since he, in the course of his own employment, was distributing the product of the struck employer. His act of refusal was therefore one in concert with the striking employees for their mutual aid and protection.

Prior to the enactment of the Labor Management Relations Act of 1947, Section 7 of the National Labor Relations Act of 1935 was given broad meaning. Union activities were protected including practices now restrained by Section 8 (b) of the 1947 Act. It follows that Congress, in

enacting Section 8 (b), intended to proscribe activities heretofore protected. But from that group of former rights that had once been protected, the one activity that was expressly preserved, was the right of an employee to refuse to cross the picket line of another employer at a plant other than his own. Consequently, we have the strongest legislative affirmation that the activity which Waugh engaged in was protected within the meaning of Section 7 and enforceable under Section 8 (a) (1) of the amended Act.

The court below, while recognizing that Waugh's activity was one guaranteed protection by Section 7, nevertheless confined the exercise of the right to non-working hours on a demonstrably inapplicable analogy. While concededly employers have enforceable rights to the management of their own businesses, conflicting rights are not to be reconciled by extinguishing one of them. The analogy relied upon by the majority opinion below, and extended as a rule to this instance, is not apposite for the simple reason that their subject matter is quite different.

Section 8 (b) (4) makes it a union unfair labor practice to "encourage the employees of another employer to engage in * * * a concerted refusal in the course of their employment to * * * handle or work on any goods * * *" where the object of the refusal is one of those prescribed by that sub-section. It is in exactly that part of the statute proscribing refusals "in the course of their employment" that the saving proviso is set forth protecting the right of employees to refuse to cross a picket line established at a plant of an employer other than their own.

Therefore, the majority below were doubly in error in that:

(1) Although the right to respect an outside picket line was palpably not similar to a right to union organizational activity on company time, the Court insisted upon treating them as similar, so that a rule applicable to one was extended to the other, limiting its exercise to non-working hours. It is submitted that while the organizational right is left substantially unimpaired and protected, the right to respect a picket line is virtually destroyed.

(2) It extended the rule directly contrary to the terms of the statute which explicitly contemplated and protected action in the "course of * * * employment."

The Board, while holding Waugh's discharge to be an unfair labor practice, apparently felt it necessary to chart a course of action for the employer, viz., to tender Waugh an election between performing all of his duties or going out on strike subject to replacement. This promulgation of a rigid procedure governing the actions of both employer and employee in future instances was unnecessary for the decision of the case. It was enough for the Board to affirm that an employer in similar situations can lawfully endeavor to have the refused work done. It was not proper to assume that in every instance an employee would be obliged either to cross the picket line or go on strike and subject himself to replacement.

ARGUMENT

I

The refusal of an employee to cross the lawful picket line of another union at the plant of an employer other than his own is concerted activity of assistance to labor organizations for purposes of mutual aid or protection within the meaning of Section 7 of the Act.

The Court below was in unanimous agreement on this point. However, the decision of the Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir., 1951), certiorari denied, 342 U. S. 885, while distinguishable[4] in several important respects, is in conflict with the decision in the instant case. There it was held that the refusal of eight employees to cross the picket line of another union to get to their own place of employment was neither activity in concert nor for mutual aid or protection and therefore not protected activity within the meaning of Section 7 of the National Labor Relations Act of 1935.

The decision in the *Illinois Bell* case was relied upon by the respondent and was cited by the majority as authoritative for its own decision.

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[4] The picketing organization neither claimed nor had jurisdiction over the picketed plant whose employees were represented by another union of which the eight employees were members. The court laid great stress on the proposition that the employees were acting in derogation of the authority and standing of their own exclusive collecive bargaining representative which was not on strike. The case was also decided under the National Labor Relations Act of 1935, but had the Labor Management Relations Act applied, the saving proviso of Section 8(b)(4) with regard to picket lines could not have been applicable since the plant being picketed was the plant of their own employer.

The conflict goes to the very meaning of Section 7. If "concerted activities" are to become a term of art meaning only activities in conjunction with one's fellow employees; if "assisting labor organizations" is to mean only assisting one's own union; and if "mutual aid or protection" is to become a test to be satisfied only by a showing of immediate tangible benefit to be received by the participant, then the protection guaranteed in the Act has been so limited as to cover only immediate employee-employer relationships. We think that in this important aspect, the decision in the *Illinois Bell* case is in error and at variance with the express provisions of the amended Act, the determinations of the Board and the holdings of the courts.

The amended Act does not lend itself to such narrow construction. Section 2 (3) expressly provides that the term "employee" is not to be limited to the employees of a particular employer. Taken in conjunction with Section 2 (9) wherein "labor disputes" are defined so that the disputants need not stand in the direct relation of employer-employee, it becomes apparent that any attempt to encapsulate the protective coverage of the Act to activities wherein the only participants are those standing in direct employer-employee relationships does violence to the plain direction of the Act.[5]

The affirmative portion of Section 7 of the Act is identical with Section 7 of the National Labor Relations Act of 1935 (Wagner Act) which in turn took the provision from Section 7 of the National Industrial Recovery Act. The

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[5] Even without the statute, other guarantees define and protect a broader interest. See, for example, *American Federation of Labor* v. *Swing*, 312 U. S. 321.

activities described therein were neither created, nor evoked by the section; they were merely made matters of right and given legal protection against employer interference. Unions and their memberships did not wait for the statutory protection to engage in concerted activities for mutual aid or protection, among them the traditional activity of respecting a picket line; the history of American labor is replete with such action prior to 1935. The fact that refusal to cross a picket line was a time honored form of concerted activity when Section 7 was first formulated hardly argues that it was intended to be excluded from coverage by an enactment which declared that employees were to have the right to "assist labor organizations" and engage in "concerted activities" for "mutual aid or protection."

The Board, vested as it is, with the task of applying the Act to the myriad facts and events making up the labor scene, has consistently held that persons honoring picket lines are engaged in protected activities within the meaning of Section 7 and that coercive employer measures in these instances are unfair labor practices[6]

The narrow doctrine enunciated in the *Illinois Bell* case, *supra*, runs contrary to the case law preceding it. The true quality of "mutual aid or protection" was ably pointed out by the Court of Appeals, 2nd Cir., per Hand, C. J. in *National Labor Relations Board* v. *Peter Cailler Kohler*

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[6] See *Montag Brothers, Inc.*, 51 N. L. R. B. 366 (1943); *Illinois Bell Telephone Co.*, 88 N. L. R. B. 1171 (1950); *New York Telephone Co.*, 89 N. L. R. B. 383 (1950); *Cinch Manufacturing Co.*, 91 N. L. R. B. 371 (1950); *West Coast Casket Co.*, 97 N. L. R. B. No. 108 (1951).

Swiss Chocolates Co., Inc., 130 F. 2d 503 (2nd Cir., 1942) at pp. 505, 6:

> "* * * When all the other workmen in a shop make common cause with a fellow worker over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid and protection' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts. So too of those engaging in a 'sympathetic strike' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid and protection'."[7]

In the amended Act, Congress restrained certain labor activity through the enactment of Section 8(b) which re-

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[7] See also *Fort Wayne Corrugated Paper Company* v. *National Labor Relations Board*, 111 F. 2d 869 (7th Cir., 1940) per Evans, C. J., at page 874, "The Wagner Act will not be construed to have so narrow a scope as to protect union activities only in the interrelation between the employees and employer of one company. Unionism on a national scope is too well a recognized fact to confine legal protection solely to intracompany relations. Unions would gain little bargaining ability if they were protected solely in company units"; and *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Company*, 167 F. 2d 983 (7th Cir., 1948).

moved protection from the totality of "concerted activities" for "mutual aid or protection" hitherto guaranteed by Section 7. In Section 8(b)(4) those activities whose purpose fell within any of the four proscribed classifications were made subject to restraint by the Board. But Congress was careful to save from proscription "a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;". Here, if anything, is irrefutable statutory affirmation of the protection contained in Section 7 for the particular form of concerted activity which is the subject of the instant case.

Other courts have not hesitated to find refusal to cross picket lines a protected activity within the meaning of Section 7. *National Labor Relations Board* v. *Montag Brothers, Inc.*, 140 F. 2d 730 (5th Cir., 1944); *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (5th Cir., 1950).

II

It was error for the court below to withdraw the protection of the Act from Waugh's conceded right to respect the picket line because he had exercised it in the course of his employment.

Once the court below arrived at the conclusion that Waugh's refusal to cross the outside picket line was an activity "expressly guaranteed by Section 7 of the Act"

(R. A. 17), it was bound to make good the guarantee and vindicate the exercise of the right. Yet the court concluded that the right, so expressly guaranteed, was illusory, because it had been exercised during working hours and Waugh had thus left himself open to summary discharge by his employer.

The majority below achieved this anomalous result by finding an analogy applicable to facts and phenomena not at all analogous to Waugh's situation, and by applying the rule so derived even though it extinguished Waugh's right. Because, reasoned the majority below, the right to engage in union organizational activity had been limited to non-working hours in deference to management's prerogative,[8] the right to respect another union's picket line at another employer's plant should be similarly limited. What the majority below did not see was that while such a limitation leaves the exercise of the right to organize virtually unimpaired, since organizational activities can be effective at most times, and frequently are conducted outside of working hours, it completely stultifies the right to refuse to cross a picket line which can only be effectively exercised during the working hours of the employee exercising the right.[9]

The *Republic Aviation* case, *supra*, had affirmed the policy of the Board in reconciling rights which in certain

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[8] See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793; *Peyton Packing Company*, 49 N. L. R. B. 828 (1945).

[9] "'Protecting' the right to refuse to cross a picket line only in non-working hours is, in effect, to accord no protection at all." Article, Immunity from Discharge for Refusal to Cross a Picket Line, Columbia Law Review, Vol. 52, No. 7, pp. 934-936 at p. 936 (November, 1952).

contexts might be conflicting.[10] The particular Board policy there affirmed was the rule that the right to participate in union organizational activity on company premises, in deference to management's prerogative of directing employer conduct during working time, could be limited, if the company so directed, to off-duty time.[11] The general principle thus enunciated by this Court was a rule of reason aimed at striking balances between rights in areas of conflict so as to allow the fullest possible exercise of these rights as circumstances could equitably permit. In the par-

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[10] 324 U. S. 793 at pp. 797, 8, the Court saying, per Reed, J.:

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.
>
> "The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. * * *".

[11] By the same token, employers generally cannot prohibit such activity on company premises during employees' off-duty time. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811 (7th Cir., 1946); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 (8th Cir., 1944).

ticular context dealt with by the *Republic Aviation* case, both management's and labor's rights were preserved and left unimpaired by the disposition of this Court.

Quite different was the disposition of the majority below which, in purporting to make the *Republic Aviation* case the determinant of its decision, violated its general principle by applying the specific rule to dissimilar facts. Patently the refusal of an employee to cross another union's picket line at another employer's plant is not the same as organizational activity amongst employees at work in a plant. Here, by limiting the right of refusal to non-working hours, the very right was destroyed which admittedly had been guaranteed by Section 7. Conversely what should have been a right of endeavor on the employer's part in such a situation was expanded into an unqualified right of command.

In determining rights, as in the instant case, the court was bound under the doctrine of the *Republic Aviation* case to find a balance between them, not to destroy the employee's statutory right in favor of the employer's right to run his business as he sees fit.

The analogy drawn by the court below was not only inapposite because of the difference in the facts to which it was applied, but the Act itself precluded it. For while the *Republic Aviation* case and the Board policy which it affirmed, governed a balancing of rights where the Act was silent, such is not the case here. The proviso, in Section 8 (b) (4) of the Act, which saves the right of an employee to refuse to cross outside picket lines, sets it apart from a group of otherwise proscribed activities where employees are induced "* * * to engage in * * * a concerted refusal

rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

in the course of their employment to * * * handle or work on any goods * * *." In that context there is no longer room for analogy and the Act expressly protects the rights of employees who refuse to enter picketed premises "in the course of their employment".

The proviso itself carries its own striking evidence of the intention of the Congress to protect such refusals during working hours. The act which the proviso protects is the "refusal" of a person to enter upon picketed premises. The connotation of "refusal" is a negative response to a direction, request or command and, in the statutory context, can only mean a refusal to his own employer's request at any time inclusive of working hours. Nor does the statutory concern that such refusal not be deemed unlawful make much sense if all that it seeks to do is protect from sanction the act of an employee in his off duty capacity of private citizen in not entering upon picketed premises when in any event he is not subject to employer discipline.

The court below endeavored to show that had Waugh been given the opportunity to go out on strike, his effort would have been foredoomed to failure since the assistance of his own union would have been illegal under the provisions of Section 8 (b) (4) (A) of the Act. The court is implying that concerted activity by Waugh's fellow employees to obtain Waugh's reinstatement would be an illegal secondary boycott. Strikes and other concerted activities to force reinstatement of discharged, laid off, or replaced employees are entirely legal, being denominated economic or unfair labor practice strikes according to the

circumstances attending their inception.[12] To attempt to outlaw activities having *bona fide* legal purpose, because the incidental effect might be a cessation of the employer's ability to carry on his business including that with a picketed customer would go a long way toward nullifying the rights accorded by theAct.[13] The court below seemed intent not only to justify Waugh's summary discharge for engaging in protected activity, but to give the employer continuing guarantees against concerted activities that could have been taken in Waugh's behalf.

The Board felt obliged to prescribe a course of conduct to be followed after an employee has exercised his right to refuse to cross an outside picket line in the course of his employment,

> "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

One can appreciate the reasons of the Board for charting such a course in the light of case law which it mistak-

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[12] *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748 (9th Cir., 1951); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714 (8th Cir., 1944); *National Labor Relations Board* v. *Greensboro Coca-Cola Co.*, 180 F. 2d 840 (4th Cir., 1950); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919 (2nd Cir., 1941); *Douds* v. *Local 1250, Retail Wholesale Dept. Store Union of America, C. I. O.*, 173 F. 2d 764 (2nd Cir., 1949).

[13] Cf. *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U. S. 665; *National Labor Relations Board* v. *Service Trade Chauffeurs, Salesmen & Helpers, Local 145*, 191 F. 2d 65 (2nd Cir., 1951).

enly deem applicable.[14] The cases which declare that workers cannot unilaterally dictate the conditions of their employment, but must either go out on strike for their demands or accept employer directions are but variants of *National Labor Relations Board* v. *Fansteel Corp.*, 306 U. S. 240, and *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U. S. 332. In each instance, the employee conduct, *i.e.*, refusal to accept either alternative, placed the offending employees in the position of having committed a wrong similar to trespass or breach of contract for which they could be summarily discharged.[15] Here Waugh had exercised a right which was given him by the Act under circumstances clearly contemplated by the Act. While the employer had a clear right to take whatever lawful measures were available to it in an endeavor to get the refused work done, it could do no more than was necessary in the circumstances for that purpose. Otherwise the object would not be to get its job done but rather to trample on the right which Section 7 had given and guaranteed to Waugh. Conceivably many situations might arise where an employer, from the standpoint of his interest, would have no alternative but to require the refusing employee "as a striker, to

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[14] *National Labor Relations Board* v. *Montgomery, Ward & Co., Inc.*, 157 F. 2d 486 (8th Cir., 1946); *National Labor Relations Board* v. *Kopman-Woracek Shoe Manufacturing Company*, 158 F. 2d 103 (8th Cir., 1946); *C. G. Conn. Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (7th Cir., 1939).

[15] Cf. *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir., 1950) where employer reprisal after termination of single stoppage to present demands was invalidated, with *International Union, U. A. W., A. F. L.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

vacate his job and make way for his replacement.'"[16] Nothing in the instant situation required a discharge of Waugh to accomplish any legitimate employer objective. For two days the employer had found means of distributing the Review Star (B. A. 45-47); after Waugh's discharge other members of Waugh's union made the pickup (B. A. 21; 55-56). Certainly Waugh's position was no block to the employer; at most a transfer of routes could have satisfied any legitimate employer interest. Despite the disclaimer, the case seems a clear instance of the discrimination mentioned in footnote 4 of the majority opinion below,

> "'[4] We do not have here a case in which the order to cross the picket line was a discriminatory order enforced against a union employee in order to prejudice him by reason of his union membership. Such a situation would, of course, involve other considerations.'"

Instead of giving employers a universal right to require employees in Waugh's position to become full fledged economic strikers, the Board would have been better advised to advise employers of their right to take only such measures as the specific circumstances required to accomplish their legitimate objective.

While the collective bargaining agreement between Waugh's union and his employer and the arbitration that

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[16] Without prejudice to his rights of reinstatement at the termination of the strike. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333; *The M. H. Ritzwoller Company* v. *National Labor Relations Board*, 114 F. 2d 432 (7th Cir., 1940); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, *supra* note 12.

was had thereunder seem to have been taken out of consideration in this case because of the prior action of the Board in voiding the contract in its entirety,[17] it is doubtful whether it could have governed the outcome of this case in any event. That contract did not bargain away Waugh's statutory right to refuse to cross an outside picket line. If it had, it would have been, as the arbitration was, an attempt to derogate from the rights vested in the Board. As Jackson, J., stated for the Court in *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332 at p. 337 with respect to private contracts,

> "* * * 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility."

An attempt, by arbitration, to deprive a person of rights prescribed by law or derogate from public bodies charged with enforcement could not be enforced under the local law.

Western Union Tel. Co. v. *American Communications Ass'n, C. I. O.*, 299 N. Y. 177;

Kingswood Management Corp. v. *Salzman*, 272 App. Div. 328 (N. Y. 1947);

Publishers' Ass'n of New York City v. *Newspaper & Mail Deliverers Union of New York and Vicinity*, 280 App. Div. 500 (N. Y. 1952).

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[17] *Rockaway News Supply Company, Inc.*, 94 N. L. R. B. 1056 (1951).

CONCLUSION

The judgment of the court below should be reversed and the order of the Board enforced.

Respectfully submitted,

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December, 1952.

APPENDIX

The applicable sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151 *et seq.*), are as follows:

2(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to chapter 8 of Title 45 and section 225 of Title 28, or by any other person who is not an employer as herein defined.

2(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class

agement, in keeping with the provisions of the statute. Not only is it a far better and more equitable solution than that of the Court below, but it appears to strike the best possible balance between competing forces. Such a fair and reasonable formula should not be upset unless it is plainly contrary to legislative intent.

The Board, in its holding, ruled that Waugh's refusal to cross another union's picket line was a protected activity for mutual aid or protection under Section 7 of the Act. To this extent, the Court below agreed. But Waugh's employer, not concerned in the labor dispute between third parties that produced the picket line, also had the right to keep his business going. Accordingly, the Board ruled that the employer could compel Waugh to cross the picket line or, in accordance with his protected rights under Section 7, vacate his job as a striker. Waugh's strike would ostensibly be against his own employer in an effort to gain the concession of not being forced to violate trade union principles that would ultimately provide him with the protection and advantages that labor organizations bring to American workmen.

As the Court below noted, the employer would then have the right to replace Waugh as an economic striker. That, of course, is the risk that any American workman runs if he elects to lay down his tools and go on strike. The Court below added the assertion that "it was inconceivable that Waugh could have won his strike." This assertion, at best a gratuitous one, at once denies Waugh the right even to try and also does not take into account other factors which might enable Waugh eventually to win his strike.

The consequences flowing from the Board ruling would allow Waugh to return to his employer after a few days of his strike, if he had not been replaced, yield to his employer's demand, resume his duties and cross the picket line. On the other hand, the employer might not be able to replace Waugh if he was operating in an area of labor scarcity or

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NO. 318

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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I

Reasons for Intervention as Amicus Curiae.

The American Federation of Labor has requested and been granted permission by the parties to file a brief amicus curiae on behalf of its various affiliates and their numerous members because there is here involved one of the most ancient and important rights of organized labor, namely, the right of individual members of unions to respect

picket lines established by their fellow union members. This right, while a fundamental one, may not be of the same order as those rights protected under the First Amendment, but until the decision of the Court below it was thought the right had at least the same status as the right to strike, being in its essence merely a variation of that right. Until the decision of the majority below, the Board had respected the right of union members to refuse to cross picket lines to the same degree as it had respected the rights of economic strikers, and this was true both under the Wagner Act and under Taft-Hartley. It was not thought that Taft-Hartley would diminish that right nor is there anything in the legislative history which so indicates. On the contrary, the proviso to Section 8(b)(4) of Taft-Hartley would seem to give greater or at least more explicit recognition of that right than was true under the Wagner Act. Not withstanding these considerations and others which are discussed in the Board's brief and which will be discussed in this brief (we hope without undue repetition of the Board's arguments) the Court below has decided that this right is one which has no protection at all under the Act, not even protection given to the right to strike for economic ends. It is the purpose of this brief, first, to impress upon this court the traditional and important nature of this right of union members to refrain from violating legitimate picket lines established by their fellow workers, and, second, to indicate considerations in addition which are supplemental to those made by the Board in its brief.

II

Respect for Picket Lines is a Traditional and Fundamental Trade Union Practice and is Mutual Aid and Protection in the Most Literal Sense.

The practice among labor unions, and the employees who make up their membership, of respecting the picket lines of

other labor organizations is one of the fundamental principles of trade unionism. In this principle lies much of the strength of labor solidarity that has brought trade unions to a responsible position in American society and moved employers and employees toward the building of a mature and democratic labor policy.

This principle is so fundamental that many, if not most, unions have provisions in their constitutions that their members should not cross picket lines established by other labor organizations.[1] A report of the General Executive Board of the International Ladies' Garment Workers Union, AFL, 1950, illustrates what this principle means to American workmen, in the following statement:

> "Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life."

A labor commentator has said in one of the leading studies on the activities of trade unions, "From the point of view of union morality, a good union man never crosses a picket line no matter whose picket line."[2]

As a matter of fact, a typical expression of trade union sentiment was made by Waugh, the employee involved in this case, who said when asked by his foreman to cross the picket line, "As a union man I would not cross that picket line and thereby become a scab or a strike breaker," and

[1] Barbash, "Labor Unions in Action," 1948, page 129.
[2] Ibid.

that he had a "right", as a union man, not to "harm another union."[3]

Awareness of the labor fact of life that union men respect picket lines is also found in numerous statements of the courts. Perhaps the best statement was made by Judge Healy of the Court of Appeals for the Ninth Circuit in *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331 (1948), where he said at 334:

> "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

Opinions of this Court made in cases not involving any question like the instant one, have given recognition to this principle in statements acknowledging the practice.[4]

The same court that rendered the decision below has stated in another opinion that employees display an "habitual unwillingness to cross picket lines."[5]

The National Labor Relations Board, the governmental agency most familiar with labor problems, has called the refusal to cross a picket line a traditional kind of action, "time honored in the history of the American labor movement," and "a necessary and unavoidable incidental effect

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[3] Brief for National Labor Relations Board, *NLRB v. Rockaway News Supply Co.* before the U. S. Court of Appeals, Second Circuit, pp. 3-4.

[4] "The customary means of enlisting the support of employees to bring economic pressure to bear on the employer," *Brotherhood of Electrical Workers v. NLRB*, 341 U. S. 694, 703; it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence . . . employees of a customer not to cross the picket line," *NLRB v. Denver Building Trade Council*, 341 U.S. 675, 687.

[5] Frank, J., in *NLRB v. Service Trades Chauffeurs*, 191 F. 2d 65, 68.

of a form of concerted action undertaken in a conventional and traditional manner."[6]

Thus, in its traditional use by labor organizations and their members and its recognition as a labor fact of life by the courts and governmental agencies, respect for picket lines has practically become a "labor common law right."

Thus, it was only natural for Congress to add its recognition of this traditional labor right when it constructed the various provisions of the labor law. Approval of this traditional labor practice was nowhere specifically spelled out but numerous sections of the statute imply its acceptance. The most fundamental, of course, is Section 7, which protects employees' rights to assist labor organizations and to engage in concerted activities for the purpose of mutual aid or protection. The substantive aspects of whether or not a refusal to cross a picket line is protected in Section 7 has been discussed by the parties and the Court below and will not be enlarged upon here except to state that this party amicus vigorously contends that such a refusal is a protected activity within the meaning of Section 7 as held by the Court below.[7]

Congressional recognition of the traditional practice of members of one union respecting another's picket line is interwoven throughout Section 8(b)(4), the so-called secondary boycott provisions of the Act. The Congress in 1947 made it an unfair labor practice for a labor organization to induce or encourage employees of any employer to quit work or refuse to handle goods where an illegal object was involved. One of the primary forms of the inducement or encouragement that Congress was attempting to restrict was that brought about by respect for another union's picket line, since one of the principal ways in which labor organizations induce employees to quit work is to place a picket line around a place of business and rely upon the

[6] *Cyril De Cordova & Bros.*, 91 NLRB 1121, 1950.
[7] 197 F. 2d 111, 113.

traditional practice of the other employees not to cross that picket line. Congress made such activities unlawful only under certain conditions not involved here.

Then Congress went a step further, showing its complete recognition of labor's right to respect picket lines by adding the much disputed proviso to Section 8(b)(4). This proviso reads:

> "Provided that nothing contained in Section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Whatever this proviso means, one thing appears fairly certain—Congress was adding its recognition of the long accepted right of employees to respect a picket line of a striking union.

Not only has the principle that a union workman will respect another union's picket line been given hitherto unquestioned recognition, but it is also obviously activity for mutual aid or protection. Judge Healy's remark sums up the argument, "Respect our picket line and we'll respect yours."

The respondent, in its brief, attempts to argue the obvious proposition that not every concerted activity is protected and then apparently assumes that if a refusal to cross a picket line is mutual aid or protection, it is entitled to no more approval than some of the unlawful activities this Court has refused to approve in the past.[8] But it is utter sophistry to attempt to compare the traditional, recognized practice engaged in for many decades with such conduct as sitdown strikes and like action amounting to a sabotage of the employer's operations. Judicial approval of the solution worked out by the National Labor Relations Board,

[8] Brief for respondent, pp. 19-22.

which gives some measure of protection to the employee who refuses to cross a picket line, would involve accepting conduct no more socially undesirable than an ordinary strike. The principle that the picket line will be respected is just as fundamental in our free society as is the totally accepted premise that strikes are a legal form of activity.

The respondent's argument totally fails to give due import to the equitable decision of the Board in this case, which permits the employer to run his business to his fullest satisfaction and at the same time gives his union workman who respects a picket line some measure of protection.

It is for this fundamental right that the American Federation of Labor and all its affiliates contend. The decision of the Court below constituted an unwarranted stab at one of the most fundamental of American labor practices and was a gratuitous reversal of a carefully worked out solution of the National Labor Relations Board, the agency charged by Congress with the basic responsibility for interpreting the Act.

III

Interpretation Put on the Act by the National Labor Relations Board Gives Proper Recognition to the Rights of Both Employers and Employees and Should be Approved.

The Board in this case was confronted with a conflict between the important and traditional right of individual members of labor organizations to respect the picket line of their brothers and the equally important right of the employer to direct his own business. In its legal acceptance of the strike, society has already given full recognition to one great limitation on the employer's free right to run his own business. But here a much lesser limitation is involved, although the consequences have important implications both for labor and management.

The solution worked out by the National Labor Relations Board gave recognition to the rights of both labor and man-

in an area where trade union consciousness was high enough to prevent any person, as a matter of principle, from taking Waugh's job.[9]

Then, too, Waugh's union might come to his assistance, contrary to the views of the Court below, and force the employer to yield. Or, the employer, valuing Waugh's services, might want to make the same arrangements he had earlier made before Waugh was fired, namely, have the papers brought outside the picket line for Waugh to deliver.

Under the Board's decision, even if the employer had hired a replacement, Waugh would be first on the list to be rehired in the event he wanted to capitulate and accept the employer's terms. But the Court decision strips Waugh of all his rights, permits him to be fired outright, and goes a step farther even than the 1947 Congress intended when it amended the Act.[10]

One of the great complaints of labor organizations about the decision of the Court below is that it gave little or no consideration to the equitable consequences of the Board decision. In addition, as will shortly be demonstrated, the Court below used highly doubtful legal logic to support its position. Apparently the Court below chose not to follow the Court of Appeals for the Seventh Circuit in its treatment of Board decisions which weigh competing rights under the Act. In *NLRB v. Illinois Tool Works*, 153 F. 2d 811, 816 (CA 7, 1946), Judge Kerner wrote for a unanimous Court:

> ". . . (I)t is the function of the Board to weigh the conflicts which arise from time to time out of the exercise of those rights and to determine in each case

[9] As the facts indicate, Waugh's refusal to cross the picket line was solely a matter of trade union principle.

[10] Note the opening words of Judge Clark's dissenting opinion: "While the Taft-Hartley Act reversed the trend toward unionism fostered by the Wagner Act, it did so by bringing the employer also within the aegis of administrative agency protection, and not by reversion to laissez faire," 197 F. 2d 111, 115.

> whether the interests of the employees or the interest of the employers should be held paramount . . ."

This Court, too, added its recognition of the role of the Board in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, when it said, at 692:

> " . . . The Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. . . ."

If there has ever been a situation in which valid rights of both parties are in close contention and a carefully worked-out solution of the Labor Board giving protection for both is entitled to weight, this situation is it. The Court below should have rejected the Board solution only if it was clearly erroneous in law, and it is apparent that the Board holding is not so clearly erroneous. Dissenting Judge Clark noted this in stating that: "Accordingly, I can see no legal basis for refusing enforcement of this Board order."[11]

IV

The Only "Unrealistic" Holding Was That of the Court Below.

The Court below in rejecting the Board's solution, said: "We think that the Board is wholly unrealistic . . ."[12] The Court assigned as its reasons for this view that Waugh could have been replaced as an economic striker, that it was inconceivable that Waugh could have won his strike and that had his union come to his assistance, the union would have been in violation of Section 8(b)(4), the so-called secondary boycott provisions of the Act. This evaluation of the Board's position came after the Court had al-

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[11] 197 F. 2d 111, 116.
[12] 197 F. 2d 111, 115.

ready reached its own conclusion that Waugh could be fired outright.

(a) The Weighing of Rights

In substance, the Court below first found that Waugh's right to refrain from crossing a picket line was a participation in activities for the purpose of mutual aid and protection, expressly guaranteed by Section 7 of the Act.[13] But then it followed with the contradictory revelation that this activity was not a guaranteed activity at all. It held Waugh's guaranteed right was only guaranteed on his off-duty time, when any other citizen had the same free right to refrain from crossing any line he chose. Judge Clark characterized his holding as "a practical nullification of the statutory provision."[14] We would characterize this holding as an absurdity; obviously no real substance can be attached to the right to refuse to cross a picket line unless that right exists both when a man is on his job and when he is off of his job.

The Court discussed the employer's right to run his own business and make and enforce reasonable rules covering the conduct of his employees on company time. The apparent conflict between an employer's rule that would nullify a protected statutory right of an employee was passed over by restricting the protected statutory right to off-duty time. Thus the Court weighed the conflicting rights, approved the employer's, placed a restriction we think absurd on the employee's, and added that to rule otherwise would permit an employee to unilaterally dictate the terms of his own employment.

For this last proposition, the Court cited *C. G. Conn, Ltd. v. NLRB*, 108 F. 2d 390 (CA 7, 1939), which permitted an employer to discharge employees for walking off the job at their usual quitting time after they had been scheduled

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[13] 197 F. 2d 111, 113.
[14] 197 F. 2d 111, 116.

to work overtime. The rational of the *Conn* ruling and of other similar holdings[15] is that an employee cannot unilaterally dictate the terms of his own employment. But unless some logical lines are drawn, the *Conn* doctrine can be easily carried to *reductio ad absurdum*, for even a strike for higher wages might be called an attempt at dictation of terms of employment, as many union-resisting employers of the past undoubtedly have felt.

To apply the *Conn* doctrine as loosely as has the Court below is to invite any Court disinclined to give proper weight to labor's activities to use that doctrine equally loosely and to labor's equal disadvantage. The Court below made no attempt to analyze the facts of the two cases and make the distinctions that are readily apparent. The *Conn* case, as the Board's brief points out (pp. 57-60), involved an attempt by employees to continue working on their own terms, usurping one of the employer's fundamental management rights, a situation far different from the instant case. Likewise, the Court conveniently overlooked another ruling of the same Court of Appeals that decided *Conn*, where facts were far more analogous to those in the instant case than are those in *Conn*. In *Rapid Roller Co. v. NLRB*, 126 F. 2d 452, the Court of Appeals for the Seventh Circuit ruled that discharges made by the employer were unlawful and ordered full reinstatement of the employees involved. There, one group of employees refused to undermine the strike of another group by performing the duties of those strikers, thus "dictating the terms of their employment" to the approximate degree that Waugh "attempted" to do.

(b) The Court's Assumption of a Secondary Boycott was Incorrect in Law and Fact.

A clearly erroneous feature of the ruling of the Court

[15] The Court below also relied on *NLRB v. Montgomery Ward & Co.*, 157 F. 2d 486 (CA 8, 1946) and *NLRB v. Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103 (CA 8, 1946), neither of which is in point, as the Board's brief points out, p. 60.

below was that Waugh could not possibly win his strike because should his union come to his assistance to aid him, the union would be in violation of Section 8(b)(4)(A),[16] the so-called secondary boycott section of the Act. The Court, in its written opinion, made no attempt to analyze the facts in their relation to the statutory provision, but merely made the broad assumption that this violation would exist and used it as a strong point in its denial of Waugh's "statutory right."

In answering the reasoning of the majority, several factors must be considered. First, the proviso to Section 8(b)(4)[17] that nothing in Section 8(b)(4) shall make unlawful the refusal of any person to enter the premises of any employer if that employer's employees are engaged in an approved strike, immediately embroils the majority into difficulties it has not even attempted to answer. Section 2(1) of the Act includes "labor organization" within its definition of "person." Thus, if Waugh's union decided as a concerted policy that none of its members should cross the third party picket line, the 8(b)(4) proviso would accordingly protect its conduct. The Court did not consider this. And, if the employer had to rely on Waugh's fellow union members to cross the same picket line that Waugh refused to cross in order to keep his business going, he

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[16] Sec. 8(b)(4)(A): "It shall be an unfair labor practice for a labor organization or its agents—To engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

[17] "PROVIDED, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this Act."

might be compelled to yield and allow Waugh to win his strike, contrary to the Court's imagined outcome.

But even without the proviso or a concerted refusal to cross by the union, an outright strike by Waugh's union for the purpose of his reinstatement would not be a secondary boycott violation. An ordinary strike by a union for reinstatement of one of its members is a lawful economic strike,[18] and far more than indicated by the instant facts would be required to turn it into unlawful secondary action. In this case, there is nothing more than the sweeping assumption that the only purpose of such activity would have been to force Waugh's employer into ceasing doing business with the struck newspaper plant. This is tantamount to saying that a striking union, pressing a primary employer for increased wages, with a picket line around his plant, has as its purpose or object the forcing of all other employees into a ceasing of doing business and therefore the activity violates the law. Certainly a striking union with a picket line hopes to keep out all who would enter, including the employees or other employers which would cause those third party employers to cease doing business with the struck employer. But this general purpose, incident to every picket line, does not make every strike and every picket line unlawful. Section 8(b)(4)(A)[19] requires an illegal object and this object must be more than a loose "omnipresence in the sky." It must be a certain, specific, object related to compelling a specific employer to cease doing business with another employer, with a provable link of related factors demonstrating this purpose.

This Court, as have lesser tribunals, has given recognition to the need for proving such an unlawful object. In weighing the conflicting interests in *National Labor Relations Board v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, at 687, this Court said: "We must first de-

[18] *NLRB v. Globe Wireless, Ltd.*, 193 F. 2d 748 (CA 9, 1951).
[19] Note 16, Supra.

termine whether the strike in this case had a proscribed object." Then Mr. Justice Burton, for the majority, went on to sum up the concrete proof that demonstrated an object or purpose of the union's activity. In that case, the union had a direct interest in causing an employer to cease doing business with another particular employer with whom it had a long standing labor dispute.

In *Elliott v. Amalgamated Meat Cutters*, 91 F. Supp. 690 (W.D., Mo., 1950), another secondary boycott case, the Court said:

> "To warrant an unfair labor practice finding in this case under Section 8(b)(4)(A), two factors must combine . . . (1) the alleged activities must have as an object the forcing or requiring any employer, inter alia, to cease using the products of any manufacturer or to cease doing business with any person: and (2) the activities must constitute inducement and encouragement of employees in the course of their employment within the meaning of Section 8(b)(4)(A). The absence of either factor will defeat the charges here made as to any 8(b)(4)(A) violations. *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331."

The National Labor Relations Board has consistently required proof of an illegal object in its handling of unfair labor practice cases and will dismiss a complaint unless the object is shown. Thus, in *Oil Workers' International Union*, 84 NLRB 315, 319, it said:

> "Moreover, on the facts of this case we would be compelled to dismiss the complaint on yet another ground, because we are not persuaded that *an object* of the Union's activity was forcing or requiring Pure Oil to cease doing business with Standard Oil or Great Lakes to cease doing business with Pure Oil."

Thus, before any violation of the law by Waugh's union could be shown, it would be necessary to prove that a specific object of that action was to force the respondent Rockaway News Supply Co. to cease doing business with the struck

newspaper plant. But a strike against Rockaway would not have that object at all—but only the goal of reinstatement of Waugh. If such action compelled Rockaway to cease doing business with the struck plant, it would have the same kind of incidental effect that any primary strike would have when third party employers were forced to cease doing business with a struck employer. What would need to be proved would be a showing that Waugh's union would stand to benefit in some ascertainable concrete manner by a cessation of business between Rockaway and the newspaper plant, and that such cessation was a specific object of the union's action. Upon the facts of this case, such a showing would be impossible.

And when the facts are further reviewed, it is clear not only that affirmative proof would be lacking but that compelling evidence to the contrary is present. Waugh, after his first refusal to cross the picket line, actually picked up newspapers from the struck plant as long as someone brought the papers outside the picket line for delivery to him. Then he went ahead with his duties and full business relations between Rockaway and the newspaper were continued as before. It was only when Waugh's employer refused to continue the practice of having someone else bring the papers outside the picket line that an impasse was reached. Accordingly, Waugh continued his refusal to cross the picket line, which was not a refusal to handle the struck employer's goods, and was fired by Rockaway.

Thus, the Court's broad assumption that speculative action in the future would violate a section of the law not directly involved in this case is incorrect. One of its major points in support of its reasoning is removed.

(c) Court Inspired Bargaining Aims.

There is still another harmful aspect of the Court's ruling, if it be allowed to stand. Respect for picket lines may become a new issue interjected into collective bargaining,

as unions will be forced to insist upon a clause relieving their members from liability for refusing to cross a third party picket line. That Courts will give effect to similar mutually-agreed-on provisons is apparent from the recent decision in *Rabouin v. NLRB*, 195 F. 2d 906 (CA 2, 1952), in which the Court approved provisions that permitted union men not to work on non-union goods. These new terms and provisions forced into collective bargaining agreements for protection of legitimate employee rights can only project collective bargaining into new tangles of litigation. And to the extent that employers, encouraged by dubious court decisions, resist such labor demands, to that extent will labor strife and discord be increased.

Therefore, the American Federation of Labor as amicus curiae respectfully urges reversal of the decision of the Court below and enforcement of the order of the National Labor Relations Board.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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Petitioner

v.

ROCKAWAY NEWS SUPPLY CO., INC.,
Respondent

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of both parties to the filing of this brief has been filed with the Clerk.

INTEREST OF THE CIO

This case, which involves the refusal of an employee to cross a lawful picket line at the premises of an employer other than his own, is of direct and immediate concern not only to every CIO international and local union, but to every union in the American labor movement. Picketing, which is a necessary

and ever present concomitant of every strike, is one of the most fundamental and essential instruments of trade union operation. By establishing a picket line, a striking union strives to invoke the aid and cooperation, among others, of employees of firms which deal with the struck employer. The aid and cooperation thus sought is the refusal of such employees to cross the picket line thereby thwarting efforts of the struck employer to move goods or services in or out of the struck plant. In many instances concerted refusals by such employees to cross picket lines spell the difference between operation and non-operation of the struck plant for the duration of the strike.

If employees of secondary employers are to be subject to discharge for their refusal to cross a lawful picket line in the course of their duties, it is clear that many such employees will hesitate to observe the picket line and the effectiveness of the picket line will be seriously and substantially diminished. To that extent also will the striking union's chances for attainment of the objects of the strike be diminished. Virtually all trade unions are impelled on innumerable occasions to resort to the strike and picketing. These weapons are the lifeblood of the trade union movement. An adverse decision in the instant case will cut a vital artery and seriously hamper concerted activities of all trade unions.

QUESTION BEFORE THE COURT

Whether an employer violates Section 8(a)(1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross the lawful picket line of a labor organization other than his own at the premises of another company which supplies goods to the employer.

ARGUMENT

It is not our intention to repeat in this brief *amicus curiae* the exhaustive statutory and case analysis contained in the brief of the Board and in the other briefs *amicus*. Rather we will attempt to supplement the statements concerning the traditional nature of refusal to cross a picket line, and to develop

a few points regarding the statute and the applicable case law which perhaps are not directly touched upon elsewhere.[1]

Refusal to Cross a Picket Line as a Fundamental and Traditional Form of Union Concerted Activity

At this late date we do not believe it is necessary to dwell at any length on the proposition that refusal to cross a lawful picket line is one of the most sacred obligations attendant on union membership. Indeed this is so axiomatic and fundamental a proposition, and is so well known to the public at large, that a court properly may take judicial notice of this phenomenon.

Picketing is almost as old as the trade union movement itself. Down through the years employers bitterly opposed this trade union sanction, and they resorted to every conceivable method of economic warfare to crush picket lines. They also invoked the aid of the courts and state legislatures to make picketing illegal.

Despite these overwhelming obstacles, picketing survived and flourished and eventually came to be recognized as a bona fide trade union tactic. This was possible only because of the emphasis which trade unions placed on the necessity for observance of picket lines by their members, and on the cooperation which was forthcoming from the members.

As previously noted, picketing invariably accompanies a strike. It is also frequently employed in organizing campaigns at non-union plants, and in boycott campaigns against non-union employers or against employers who deal with non-union employers. Several different purposes may be served by such picketing. Among others, it is designed to inform and persuade employees of a struck employer to cease work, and to dissuade potential employees from aiding the employer by becoming strikebreakers. In addition it is used to inform and persuade employees of other employers, who deal with the struck employer, not to take goods in or out of the plant of the struck

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[1] For discussions of the instant case, see Note, *Refusals to Cross Picket Lines: Protection of Workers from Employer Reprisals*, 62 Yale L. J. 92 (December, 1952); 66 Harv. L. Rev. 363; 52 Col. L. Rev. 934.

employer. It is also a medium of informing and persuading the public at large, including other union members in their capacity as consumers, to refrain from patronizing the picketed employer.

The importance of these purposes varies with the circumstances. In some situations, such as a strike at a retail establishment, picketing is expected to accomplish most, if not all, of these purposes. In other situations, such as at a manufacturing plant which does not service consumers directly, refusal of employees of other employers to cross the picket line may be the principal result sought by the picketers.[2] In that way the struck employer is denied access to essential raw materials and is prevented from shipping his finished products.

Although picketing thus served a variety of purposes, and occurred at various sites, the mores and customs which emerged made no fine distinctions between them. Unions did not develop different rules to govern the conduct of their members depending on which employer and which purpose was involved. Rather the emphasis was on the vital necessity of observing a picket line as a means of achieving labor solidarity. A union member was expected to observe a lawful picket line at the premises of any employer and under all the above circumstances.

We submit that refusal of an employee, in the course of his employment, to cross a lawful picket line at premises of an employer other than his own is a traditional form of concerted activity. It is inseparable from, and as deeply rooted as the general duty which attaches to union membership, namely, respect for a lawful picket line.[3]

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[2] *Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334.

[3] In *NLRB* v. *Denver Building Trades Council*, 341 U. S. 675, 687, this Court said that it is "traditional and permissible in a primary strike" for pickets at a mill "to influence . . . employees of a customer of the mill not to cross the picket line." The Court of Appeals for the Ninth Circuit stated: "The reluctance of workers to cross a picket line is notorious." *Printing Specialties Union* v. *NLRB*, 171 F. 2d 331, 334. The court below stated: "Such refusal to cross a picket line is habitual with union workers as this court has recently pointed out, it is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense directed to mutual aid or cooperation" (R. 75). The opinion cited *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (1951) and *NLRB* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503, 505-6 (1942).

As the Board has shown,[4] it is precisely these forms of traditional concerted activities which were unprotected under *Duplex* v. *Deering*,[5] and which Congress must have intended to protect, if it intended to protect anything, in the Norris-LaGuardia Act and the Wagner Act. While the Taft-Hartley Act placed certain curbs on these traditional activities, particularly as concerns their impact on secondary employers, it excepted from these curbs the type of concerted activity involved in this case. Consequently, this activity must be deemed to have the same protected status today that it had under the Wagner Act.[6]

The Legislative History of Section 7 of the Amended Act Demonstrates that the Concerted Activity Here Involved Is Protected.

The clear import of the language of section 2(3) and (9) and section 7 is that refusal of an employee to cross a primary picket line is protected concerted activity.[7] Our conclusion is affirmed by the legislative history of the Taft-Hartley Act concerning the rights of employees under section 7. This history shows that elaborate consideration was given to the scope of protection under section 7 and that Congress outlined clearly the very limited types of concerted activity which it desired to render unprotected. We shall show that only those unusual concerted activities which are unlawful or which are repugnant to the fundamental policies of the National Labor Relations Act, fall into this nonprotected category.

The bill which initially passed the House dealt with this question directly in section 7. This section in the House bill specifically excepted from protection concerted activities "not constituting unfair labor practices under section 8(b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements."[8]

By these provisions the House aimed to preclude repetition of certain early decisions of the Board which held, according

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[4] See Petitioner's brief, pp. 28-35.
[5] *Duplex Printing Co.* v. *Deering*, 254 U. S. 443 (1920).
[6] See Petitioner's brief, pp. 35-45.
[7] *Id.* at 17-28.
[8] H. R. 3020, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 176.

to the House, "that the language of section 7 protected concerted activities regardless of their nature or objectives." [9] The House was referring to cases where protection was given by the Board to sitdown strikers,[10] to employees whose concerted activity technically constituted mutiny,[11] and to mass picketers who forcibly prevented other employees from entering the plant.[12]

It was recognized by the House that these types of conduct, which were unlawful under federal or state law, previously had been removed from protected status by the courts. In addition, the House noted that the Board's later decisions followed the principles established by the courts to the effect that under section 7 "employees are not given any right to engage in unlawful or other improper conduct." [13] Thus, the Board had removed protection from strikers who sought to compel employers to violate the National Labor Relations. Act,[14] or the federal wage stabilization laws,[15] or who struck in violation of collective bargaining agreements.[16] Striking an employer while refusing to bargain with him was also held by the Board to be outside the ambit of protected concerted activity.[17]

While these court and Board decisions had established principles which the House deemed salutary, they were still only decisions, and the House felt impelled to write these principles into section 7 so as to preclude a change of heart by the courts or the Board.

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[9] H. R. Rep. No. 510, 80th Cong., 1st Sess. 38 (1947), 1 Leg. Hist. 542.
[10] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).
[11] *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31 (1942).
[12] *Indiana Desk Co.* v. *NLRB*, 149 F. 2d 987 (1944).
[13] H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-9 (1947), 1 Leg. Hist. 542-3.
[14] *Thompson Produets, Inc.*, 72 NLRB 886 (1947).
[15] *American News Co., Inc.*, 55 NLRB 1302 (1944).
[16] *Scullin Steel Co.*, 65 NLRB 1294 (1946).
[17] It is important to note that at least some of these concerted activities, such as refusal to bargain during a strike, were not unlawful under federal or state law prior to the Taft-Hartley Act. However, such activities were considered to be in derogation of the policies of the Act and therefore were labeled "improper." Since such activities, while not technically unlawful, undercut the fundamental policies of the Act itself, they could not be dignified with a protected status under the Act just as unlawful activities could not be so dignified. These are the types of concerted activity which the House unquestionably had in mind when it alluded to the removal by the courts of protection from "other improper conduct" as well as from strictly "unlawful" conduct.

In the bill which passed the Senate, section 7 was left unchanged from the original Act.[18] The Senate appeared to be in agreement with the court-established principles, but it apparently felt that the best way to continue to permit these principles to govern the types of concerted activity to be protected by section 7 was to leave section 7 unchanged.

The Report of the Committee of Conference indicates that there was concern in the Committee that enumeration of specific types of unlawful or improper concerted activities in section 7 might result in the omission of other types of such conduct.[19] This would leave the latter protected despite the obvious intent of Congress to deny them protection.

There was good reason indeed for such concern. For example, it is our view that the technically mutinous conduct in the *Southern Steamship*[20] case probably was not encompassed by the House bill's formulation of the specific concerted activities to be excepted from protection under section 7. Broad scope was given to the terms "unfair labor practices under section 8(b)" and "unlawful concerted activities under Section 12" in the House bill, but we do not believe that such conduct was embraced by either term.

The Senate view prevailed in the Committee of Conference as explained in the following excerpt from the Conference Report:

> "By reason of the foregoing court and Board decisions, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make *improper* conduct not specifically mentioned subject to the protection of the Act." (Emphasis added.) [21]

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[18] H.R. 3020, 80th Cong., 1st Sess., as passed Senate (1947), 1 Leg. Hist. 236-7.

[19] H.R. Rep. No. 510, 80th Cong., 1st Sess. 39 (1947), 1 Leg. Hist. 543.

[20] See footnote 11.

[21] It will be noted that the word "improper" in the above quotation clearly was meant to embrace unlawful conduct (such as mutiny in the *Southern Steamship* case) which might not have been excluded from protection by the House version of section 7. It may be inferred that the word also was meant to embrace conduct which, while not unlaw-

Having followed the Senate's approach and eliminated the specific exceptions which the House placed in section 7, the Committee of Conference nevertheless deemed it necessary to refer to other parts of the conference agreement to demonstrate its intent to remove protection from "improper" concerted activities. (Here again, as the following quotation demonstrates, this word was used primarily to refer to activities which were made unlawful—unfair labor practices—for the first time by the conference agreement.) Referring to the declaration of policy in the amended Act, the Conference Report said:

> ". . . it is stated in the new paragraph dealing with *improper* practices of labor organizations . . . that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that the undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible." (Emphasis added.) [20]

Great pains thus were taken to make it clear that Congress intended to remove protection from the "improper practices" even though they were expressly made unlawful as unfair labor practices under the Act. It was thought necessary to say this despite the fact that the principles enunciated in the court decisions which were cited and approved in the Conference Report would have made such a conclusion virtually inescapable.

In view of the great care which Congress exercised to indicate its intent to remove protection from unfair labor practices ("improper practices"), it is reasonable to assume that Congress would have given us at least some indication of any intent it may have had to remove protection from lawful concerted activity of the kind involved in the instant case.

Particularly is this so here since the established and uniform policy of the Board was to accord protection to employees who

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ful, is incompatible with the policies of the Act; e.g. unauthorized or wildcat strikes. See cases cited in 62 Yale L. J. 92, 94, n. 17 (1952); 59 Harv. L. Rev. 747, 753-5 (1946). But it is evident from the Conference Report discussion of court and Board cases referred to above that no broader meaning may be ascribed to the use of the word "improper."

[20] See footnote 19.

refused to cross primary picket lines. Moreover, this policy was approved by the courts.[28] However, we have been unable to find any indication of such intent either in the statute or the legislative history.

We believe it plain from the foregoing that Congress did not intend to remove protection from concerted activities which are neither unlawful nor in conflict with the basic policies of the Act. This conclusion must follow in light of the detailed Congressional consideration of the scope of protection under section 7; the particularity with which unlawful conduct was stated to be nonprotected; and the lack of any indication at all as to an intent to remove protection from concerted activities which are lawful and not violative of the policies of the Act, except as expressly provided for in the statute itself. (See discussion of section 9(c)(3) below.)

More important for purposes of the instant case, we believe it is even plainer that Congress did not intend to impose a nonprotected status on concerted activity which it expressly recognized as lawful. Such conduct cannot be denominated as against the policies of the Act or against public policy. If it is neither unlawful nor against public policy, it cannot be denominated "improper" either, as that term was used by Congress. Accordingly, we are constrained to conclude that such conduct must be accorded protection under section 7.

We submit that the proviso to section 8(b)(4) falls squarely into this category of lawful conduct. The proviso expressly recognizes refusal to cross a primary picket line as lawful. This can only be taken as an expression by Congress that such conduct is in accordance with the public policy and is protected under section 7.

The Express Removal of Rights from Certain Employees Under Section 8(d) and Section 9(c)(3) Reenforces the Conclusion That Congress Intended No Removal of Rights from Employees Who Refuse to Cross a Lawful Picket Line

A. Section 8(d)

The treatment prescribed by section 8(d) for employees who engage in a strike within the 60-day "cooling-off" period fur-

[28] See *Cyril de Cordova & Bro.*, 91 NLRB 1121 (1950) and cases cited therein at 1134-39.

nishes additional evidence that Congress must have intended to accord protected status to participants in the instant concerted activity of refusal to cross a picket line. A contrary interpretation would lead to the anomalous result of employees who engage in expressly illegal concerted activity being accorded more favorable treatment than employees who engage in expressly legal concerted activity. Such an intent cannot be imputed to Congress, and assuredly not in the absence of an expression to this effect in the language of the statute.

Section 8(d) defines the words "bargain collectively." (Refusal of an employer or a union to bargain collectively, of course, is an unfair labor practice under section 8(a)(5) and 8(b)(3), respectively.) Among other things, section 8(d) requires either party to a collective bargaining contract which is due to terminate to serve the other party with a 60 days' written notice of a desire to terminate or modify the contract. During this 60-day "cooling-off" period the parties are required to negotiate and to notify federal and state mediation agencies of the existence of a dispute. Finally, the parties are required, during the cooling-off period, to continue all the terms and conditions of the existing contract in full force and effect without resorting to strike or lock-out.

Violation by a union of this no-strike obligation constitutes, we presume, an unfair labor practice under section 8(b)(3) since abstinence from strike action during the 60-day period is part of the obligation to bargain collectively provided for in that section. The last sentence of section 8(d) sets forth the penalty which is imposed on employees who violate the proscription on strikes during the cooling-off period. This sentence follows:

> "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

By being deprived of his "status as an employee" the employee

loses his protection under section 7 and becomes subject to immediate discharge by the employer, whether or not his position has been filled by a permanent replacement. At this stage the employee is in the same posture as an employee who participates in any other form of concerted activity which is denominated an unfair labor practice under section 8(b), or is otherwise unlawful or against the basic policies of the Act.

However, as concerns rights upon reemployment, Congress accorded violators of the section 8(d) no-strike provision somewhat more favorable treatment than employees who engage in other "improper" conduct. Any of the latter employees who are discharged and are then reemployed by the same employer have only the status of new employees. It is as if they are being hired for the first time. Reemployment of the former employees who may have been discharged, on the other hand, results in the termination of their loss of status as employees, as set forth in the quoted provision from section 8(d). This means that they are restored to the employee rights which they held prior to their discharge. Reemployment of either category of employees, of course, is within the exclusive discretion of the employer. (It is interesting to note that although Congress saw fit to make a rather fine distinction in the penalties for these forms of illegal conduct, the court below described the far more important distinction between replacement and discharge of economic strikers as "wholly unrealistic" (R. 78).)

Thus both categories of employees lose their protected status for engaging in concerted activities which are expressly made unfair labor practices under 8(b), except that violators of section 8(d) have their old rights restored upon reemployment. It would seem that this differentiation in the penalties visited on the two groups of employees is the reason for the express specification of the penalty in section 8(d). If Congress had wanted to impose the same penalty on violators of section 8(d) as on participants in other unfair labor practices, it would have said nothing in line with its scheme of relying on the legislative history as evidence of its intent to remove protection from participants in unfair labor practice conduct. The great care which Congress thus took to establish fine degrees of penal-

ties for different types of *unlawful* conduct indicates the importance which Congress placed on deprivation of rights under section 7. Surely Congress would have been no less specific concerning deprivation of rights for *lawful* and proper conduct if that had been its intent.

Contrast, however, the treatment of the concerted activity referred to in the section 8(b)(4) proviso. That activity, of course, is not unlawful under federal or applicable state law. On the contrary, it is expressly recognized as lawful and proper. Yet there is no provision in the Act about removal of any rights for engaging in such activity. We can only conclude, therefore, that Congress did not intend to deprive employees of rights for refusal to cross a lawful picket line.

But even more striking in this context is the fact that the court below imputed to Congress an intent to treat violators of section 8(d) more favorably than participants in the concerted activity expressly sanctioned and recognized as lawful by the section 8(b)(4) proviso. The court below said the latter lost their employee status under section 7, whereas, under section 8(d), the former would have lost such status subject to possible restoration without loss of prior employee rights.

We cannot believe that Congress intended such a weird result in the absence of a clear expression to this effect. Neither can we believe that Congress intended to impose any penalties at all on employees who act in accordance with the proviso, let alone the same penalties that are imposed on participants in illegal conduct other than violation of section 8(d). If any penalties at all had been intended for engaging in conduct sanctioned by the proviso, logically they would have been less than the full deprivation of rights decreed by the court below, or the more limited degree of deprivation under section 8(d).

We submit that Congress would have acted expressly if it had desired to remove any rights, other than those which are removed by other provisions of the Act. (See below.) The absence of any expression at all in this regard is proof of an intent to continue the protected status of the conduct sanctioned by the section 8(b)(4) proviso.

B. **Section 9(c)(3)**

The express removal of certain rights from lawful strikers

in section 9(c)(3) furnishes additional support for our position. This section indicates that, when Congress desired to remove certain protections from participants in concerted activities which are recognized by the Act as *lawful*, it did so directly and expressly in the Act itself. Manifestly, Congress would have followed the same course as concerns the activity which is recognized as lawful by the section 8(b)(4) proviso, if that had been its intention.

Section 9(c)(3) provides, in part, as follows:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

This provision was aimed principally at the voting rights which economic strikers who had been permanently replaced enjoyed under the Wagner Act. It was well settled under the Wagner Act that economic strikers (those engaged in a lawful strike for improved terms and conditions of employment) were not entitled to reinstatement in their jobs if they had been permanently replaced.[24] However, in representation elections conducted by the Board in its early years, the economic strikers were permitted to vote and their permanent replacements were ineligible to vote.[25] In subsequent rulings, the Board held that permanent replacements as well as economic strikers might vote.[26]

Congress took cognizance of this rule of the Board, disagreed with it, and included the above provision in section 9(c)(3) to remove the right to vote from employees (economic strikers) engaged in lawful concerted activity, but who are not entitled to reinstatement because they have been permanently replaced.[27] (Strikers who cease work to protest employer unfair labor practices and strikers who have not been permanently replaced, of course, retain the right to vote.)

We have seen that, with respect to the concerted activity of refusal to cross a picket line, the courts and the Board regularly have held that it was protected under section 7.[28] We are

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[24] *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938).
[25] *A. Sartorious & Co.*, 9 NLRB 19 (1937).
[26] *The Rudolph Wurlitzer Company*, 41 NLRB 1074 (1942).
[27] S. Rep. No. 105, 80th Cong., 1st Sess. 25, 1 Leg. Hist. 431. A modified version of the provision in the Senate bill became part of the final statute.
[28] See footnote 23.

constrained to believe that Congress approved this line of decisions because of the careful manner in which it safeguarded this activity from any possible taint or inference of illegality by enacting the section 8(b)(4) proviso.

It therefore stretches credulity to assert that Congress intended, in these circumstances and without any statutory expression thereof, to remove any rights from employees who engage in the activity approved by the proviso. Of course, if employees who refuse to cross a picket line at another employer's premises have been permanently replaced by their own employer, they would be disqualified from voting under section 9(c)(3). According to the Board, such employees would not be entitled to reinstatement and would be covered by this section. But that is the sole penalty provided in the statute for engaging in such lawful activity. It is clear that Congress intended no other penalty in this situation.

Principles Established by the Courts and the Board Require Reversal of the Decision of the Court Below

Under well settled doctrine, conduct which clearly falls within the plain language of the statute raises a strong presumption that Congress intended such conduct to be covered by the statute. Only in rare and unusual circumstances might there be any warrant for rebutting such a presumption.

In the instant case, there can be little doubt that the refusal to cross the picket line is encompassed by the plain language of section 7 when read in conjunction with section 2(3) and (9).[20] Indeed, the court below so held (R. 75). Consequently the presumption requires that the employee who engaged in the conduct be protected, unless there is a showing of exceptional circumstances to rebut the presumption. We shall see, however, that no such circumstances are present in this case.

As we have shown in our discussion of section 7, the only rare and unusual circumstances which Congress indicated might justify denial of protection are those where the employees are engaged in "unlawful or other improper conduct." We have also shown that the quoted words were narrowly lim-

[20] See Petitioner's brief, pp. 17-24.

ited to cover conduct (a) which is unlawful under the Act, or under other federal or state laws not in conflict with the Act and (b) which, while not unlawful, is in contravention of the policies of the Act. In particular, Congress did not intend to remove protection from the normal and traditional types of union concerted activities which do not fall within (a) or (b), except to the extent that such protection is expressly removed by provisions of the statute itself.

We are not alone in our views as to the limited nature of the exceptions which may be made from the basic presumption that concerted activities are protected. The criteria of "lawful" and "unlawful" conduct recently were applied by the Court of Appeals for the District of Columbia in the *Jefferson Broadcasting* case.[30] Judge Bazelon, speaking for a unanimous court and emphasizing a prior opinion by Judge Learned Hand, summarized the criteria as follows at 31 LRRM 2094:

> "Protection under section 7 of the Act, then, is withdrawn only from those concerted activities which contravene either (a) specific provisions of basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute. The Supreme Court has indicated that '[t]he conduct this protected is lawful conduct.'[31] And Judge Learned Hand, in a case involving a union publication which severely criticized the employer's business dealings, said: '[S]o long as the activity is not unlawful, we can see no justification for making it the occasion for a discharge . . .'[32] More recently the Board in the Hoover Co. case reiterated the correct rule when it declared that it is 'not free . . . to measure concerted ac-

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[30] *Local Union No. 1229, International Brotherhood of Electrical Workers* v. *NLRB* (Jefferson Standard Broadcasting Company), No. 11235, 31 LRRM 2093, 2094 (Nov. 20, 1952). In this case certain employees were discharged during contract negotiations for distributing handbills which criticized their employer's television programs. The court held that the employees were not properly discharged unless it is determined by the Board that distribution of the handbills constituted unlawful conduct.

[31] The opinion cites *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 255 (1939).

[32] The opinion cites *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 506 (1942).

tivity in terms of whether the conduct is wise or fair or satisfies standards which we think desirable.' " [33]

When the concerted activity involved herein is evaluated in terms of these criteria, it becomes crystal clear that the presumption must prevail. The refusal to cross the picket line concededly was lawful. Moreover, it cannot be said that the refusal contravened the policies of the Act since the proviso to section 8(b)(4) expressly safeguards and approves such conduct. Accordingly the court below erred in denying protection to the employee who resorted to his rights under section 7.

The majority in the court below, unfortunately, did not rely on these criteria. It relied instead on cases which conflict with these criteria or are not applicable to the facts of this case.

The Republic Aviation Case. Principal reliance was placed on the *Republic Aviation* case [34] which forbade solicitation of union members on company property during working hours. There is no conflict between the *Republic Aviation* case and the foregoing criteria since the decision left the employees sufficient latitude to enable them to carry out the functions of that activity on company property, but on their own time. The concerted activity thus was substantially protected and interference with the employer's right to enforce reasonable discipline during working hours was kept at a minimum.

The bother with the *Republic Aviation* case is that it was misapplied to the facts of the instant case. Solicitation of union members cannot be equated with refusal to cross a picket line. While they are both forms of union concerted activities, the nature of the latter requires that it be exercised on the employer's time or not at all. There is thus presented an irreconcilable conflict between the statutory right to engage in concerted activities and the employer's right of discipline. We submit that where such conflicting rights cannot be effectively accommodated, the statutory right must take precedence over the employer's right.

The "Partial Strike" Cases. The court below also relied on

[33] The opinion cites *The Hoover Co.*, 90 NLRB 1614, 1621 (1950).
[34] *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1944).

the so-called "partial strike" cases,[8] none of which were passed upon by this Court. These cases, however, are at war with the reasoning of the opinion below, with section 13 of the Act, and with the criteria set out above.

Under the reasoning of the leading *Conn* case, which involved the refusal of employees to work overtime hours without premium pay, rights guaranteed by section 7 might be denied to any concerted activity which does not constitute a total and sustained stoppage of work. Yet, the court below expressly held that the "partial strike" activity here involved is a right guaranteed by section 7 (R. 75).

More important, however, is the failure of the court below to recognize that the *Conn* case is in direct conflict with section 13, as amplified by section 501(2), of the Act.

Section 13 provides:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations on that right."

Section 501(2) provides:

> "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

If the only type of strike activity which can qualify for protection under the *Conn* case is a total strike, the language of section 501(2) is rendered meaningless. We believe it is clear, however, that these statutory provisions cover more than just total strikes, and that they nullify completely the rule of the *Conn* case.

Finally, the concerted activity involved in the *Conn* case

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[8] *C. G. Conn, Ltd.* v. *NLRB*, 108 F. 2d 390, 397 (1939); *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496 (1946); *NLRB* v. *Kopman Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108 (1947). The refusal to work in the *Kopman* case does not appear to have been part of any concerted activity which makes that case inapposite to the facts of the instant case. Compare the *Conn* case with *Rapid Roller Co.* v. *NLRB*, 126 F. 2d 452, 460-1 C. A. 7), certiorari denied, 317 U. S. 650, discussed in Petitioner's brief, pp. 50-60.

would be protected under the criteria approved by Congress and other courts for interpreting section 7. Admittedly, refusal to work overtime is lawful in the absence of contrary obligations in a collective bargaining contract.

In addition we confess an inability to perceive how such refusal contravenes the policies of the Act any more than a total strike which, of course, is protected. We are of the opinion that the *Conn* case doctrine can lead only to greater industrial unrest in numerous situations where a total strike is unnecessary to reach an amicable settlement of a dispute. Moreover, this doctrine works a hardship on weaker unions which may not be in a position to engage in total economic action.

Our analysis of the *Conn* case is equally applicable to the *Montgomery Ward*[*] case and other cases which have relied on the *Conn* case. We submit that the rule of these "partial strike" cases has been nullified by section 13 of the amended Act and by the Congressional criteria for interpreting section 7. Accordingly these cases are not valid precedents. Moreover, we wish to emphasize that the conduct involved in the instant case differs from th concerted activities involved in the "partial strike" cases. Hence the instant case should be decided on its own merits and on the basis of the criteria previously noted.

Comparison With Other Cases. There are, of course, a number of concerted activities which fall into the unprotected category under the proper criteria for interpreting section 7. The *Fansteel, Southern Steamship* and other cases mentioned earlier involved unusual and atypical concerted activities which either were unlawful or violative of the Act's policies. The

[*] *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486. In this case, the court upheld the discharge of employees who refused to work on goods emanating from a different plant of the same employer which was on strike. Contrast the views of Justices Brandeis and Holmes in their dissenting opinion in *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 481-2:

"May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? . . . Courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."

Briggs-Stratton case [11] also falls into this category. There the conduct was not unlawful. But it contravened the policy of the Act to foster collective bargaining since the union failed to state any demands while it carried out its intermittent work stoppages. Indeed such conduct might constitute a violation of section 8(b)(3) of the amended Act. As this Court said, in *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 459 (1950), "*Auto Workers* v. *Wisconsin Board* . . . was not concerned with a traditional, peaceful strike . . ." [12]

On the other hand, the conduct in the instant case is a usual and traditional form of concerted activity, as this Court, the court below and the Court of Appeals for the Ninth Circuit have recognized.[13] It is not unlawful or against the policies of the Act. In short it is not "improper" activity as that term was understood by Congress.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

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[11] *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245 (1947). It should be noted that this case did not involve discharges of employees, and that this point was emphasized by this Court, at p. 250, in reaching its conclusion that the concerted activity there involved was not protected by the Act.

[12] See discussion of right to strike in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 655, 672-4 (1951).

[13] See footnote 3.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT.

BRIEF FOR RESPONDENT IN OPPOSITION.

The petitioner seeks a review under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, of a judgment of the Circuit Court of Appeals for the Second Circuit, entered on May 12th, 1952 (R. A. 15-21, 23),[1] denying enforcement of and setting aside an order issued by the National Labor Relations Board against Rockaway News Supply Company, Inc. (B. A. 10-14).

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit (R. A. 15-21, 21-22) are reported at 197 F. 2d 111. Findings of fact, conclusions of law and order

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[1] For the purposes of this brief, the appendix to respondent's brief in the Court below will be designated "R. A." and the Appendix to the Board's brief in the court below will be designated "B. A."

of the National Labor Relations Board (B. A. 7-36) are reported at 96 NLRB 336.

Questions Presented.

Whether it is an unfair labor practice for an employer to discharge an employee who refused to perform part of his usual duties, when that part would involve his crossing a picket line of a union other than his own, at a plant other than that of his employer.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-16.

Statement.

1. The Facts.

The facts of this case are set forth at length in the Board's brief (pp. 2-5)[2]; however, a short review of these facts will serve to clarify the issues. The respondent discharged one of its employees for refusing to perform a part of his usual duties, which consisted of picking up and delivering newspapers and periodicals. The employee refused to pick up a bundle of newspapers from the plant of the Daily Review Corporation, Rockville Centre, Long Island, New York, publisher of the Nassau Daily Review Star, which was one of his routine stops. The reason given by the employee (hereinafter referred to as "Waugh") for his refusal to carry out his duties was that the employees

[2] For purposes of this brief, the Board's petition for writ of certiorari will be designated "B. P."

at the plant of the Daily Review Corporation were on strike and were maintaining a picket line about the plant. Waugh insisted that he would not cross a picket line. He was advised by the respondent that he would have to perform all of his usual duties and that he could not unilaterally dictate the terms of his employment. The employer pointed out that Waugh was not a member of the striking union; was not an employee at the struck plant, and that he could not subject this respondent to the vicissitudes of labor strife wherever it might appear. When Waugh continued his adamant refusal, the employer advised him that its only alternative would be to discharge him. Waugh reiterated that he absolutely would not cross any picket line and therefore would not pick up the papers at the Daily Review Corporation. In view of his obdurate position, he was discharged. The collective bargaining agreement then in effect between respondent and the Newspaper and Mail Deliverers' Union, of which union Waugh was a member, provided for arbitration of such disputes. It also had a specific provision against any cessation of work (R. A. 61). The question of Waugh's discharge was submitted to arbitration and the arbitrator upheld the discharge. Waugh thereupon charged respondent with committing an unfair labor practice in that it violated Sections 8(a) (1) and 8(a) (3) of the National Labor Relations Act (hereinafter called the "Act"). The trial examiner sustained these charges and the Board based its decision on the recommendations made by the trial examiner.

2. The Board's Decision.

The Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line and therefore respondent violated Section 8(a) (1) and 8(a) (3) of the Act when he discharged Waugh, even though the

discharge was based on his refusal to perform part of his regular duties. They found that his refusal was based on his unwillingness to cross a picket line at the premises of the Nassau Daily Review Star, one of the stops on his regular route.

While the Board found that Waugh's refusal to cross the picket line was an activity protected by Section 7 of the Act, it conceded that "* * * the Respondent as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or as a striker, to vacate his job and make way for his replacement by the Respondent" (B. A. 9).

3. The Decision of the Court Below.

The Circuit Court of Appeals for the Second Circuit set aside the Board's order, thus upholding the discharge. For the purposes of this case the Court accepted the Board's contention that the refusal of an employee to cross a picket line of a union other than his own at a plant other than his own, is a right guaranteed by Section 7 of the Act, and still denied enforcement to the Board's order pointing out that these rights are not unlimited. It stated:

> "For, as the Supreme Court pointed out in Republic Aviation Corp. *v.* Board, 1945, 324 U. S. 793, 798; 'like so many others these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee' " (R. A. 17).

The Court analogized this situation to that group of cases dealing with soliciting union membership on company property. Those cases hold that although the employer may not forbid such solicitation if it is not done on company time, it is within the province of an employer to promulgate and

enforce rules prohibiting it during working hours (R. A. 18). The Court goes on to state:

> "* * * The right to assist a union of which one is not a member by refusing to cross a picket line is certainly of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member in concerted activities which will directly protect or aid in promoting their common interests" (R. A. 18).

Completing the analogy to the instant case, the Court holds that although the employer may not force an employee to cross a picket line outside of working hours, he may require the employee to perform his routine duties while on company time.

The Court stated that a discharge of an employee who refused to cross a picket line on his own time, while he was not working for the company, would of course be a violation of Section 8(a)(1); however, the same refusal on company time is a usurpation of management rights and would enable the employee unilaterally to dictate the terms of his employment, which of course he may not do.

The Court also found that had Waugh gone out on a "one man strike" as the Board suggests, he could unquestionably have been replaced as an economic striker since no unfair labor practice against his own employer was involved. It is inconceivable that he could have won his strike because he had no grievance with respondent which could have been determined in his favor, and furthermore his own Union could not have supported him since that would have been an unfair labor practice under Section 8(b)(4).

Under all these circumstances and in view of the direct holding of the Court of Appeals for the Seventh Circuit in

N. L. R. B. v. *Illinois Bell Telephone Co.*, 1951, 189 F. 2d 124, cert. den. 342 U. S. 885, which dealt with substantially the same questions as are here involved, the Court concluded that the discharge should be upheld and the Board's order set aside.

Reasons for Denying Writ.

It is submitted that this case does not present any novel questions of first impression which have not been considered before by this Court. In *National Labor Relations Board* v. *Illinois Bell Tel. Co.*, C. C. A. 7th, 1951, 189 F. 2d 124, the Seventh Circuit had to decide substantially the same questions as are involved in the instant matter. When the decision of that Court was handed down setting aside the Order of the National Labor Relations Board, the Board sought a writ of certiorari which this Court denied at 342 U. S. 885. The facts in that case raised the same issues which are involved in this case and, in fact, presented a more favorable situation from the Board's point of view. In that case a strike had been called by the Illinois Telephone Traffic Union (hereinafter referred to as I. T. T. U.) and picket lines had been established at the employer's offices throughout the State of Illinois. Another union, known as the Chicago Telephone Traffic Union (hereinafter referred to as C. T. T. U.), represented the employees working in the same industry within the confines of the City of Chicago. The C. T. T. U. was not engaged in the strike, either officially or unofficially, and was at that time negotiating with the employer for a new contract covering its members. The I. T. T. U.'s picket lines were also placed around the Chicago offices of the Illinois Bell Tel. Co. Eight supervisory employees who

worked in the Chicago area refused to cross the picket lines set up by the I. T. T. U. and therefore did not report to work. The employer informed these supervisors that their jobs would be in jeopardy if they did not immediately report back to work and that they were being demoted from supervisors to operators. They were also advised that their employment would be suspended as of the first day they failed to report for the new assignment. It must be noted that some of the employees involved held membership in both unions at the time of the strike; seven were members of the striking union; three were members of the C. T. T. U., and one was not a member of either. However, all eight employees were in the bargaining unit represented by the C. T. T. U. The Court was therefore faced squarely with the following questions:

1. Whether an employee may refuse to cross a picket line set up around the plant in which he is employed, by a union to which he does not belong, for a cause in which the employee could not possibly profit?

2. Whether an employee can refuse to cross a picket line set up about the plant in which he is employed by a Union of which he is a member but which does not represent the bargaining unit in which he is employed?

The Seventh Circuit answered both of these questions in the negative and held that by their refusal all of these employees were subject to disciplinary action by the employer and that such disciplinary action would not be an unfair labor practice or a violation of Section 7 of the Taft-Hartley Act. The Court answered the Board's contention that these acts were in reality a strike by the employees, at page 127, *supra:*

"The crucial issue, as we view the situation is whether the eight employees were protected by §7 of the Act. If so, the finding of an unfair labor practice and the order resulting therefrom is sustainable; otherwise, not. * * * It is the Board's theory that the eight employees were engaged in 'concerted activities' for their 'mutual aid or protection.' The Board terms the activities of the eight employees a 'strike', while respondent labels it as a 'wildcat strike'. *In our view it was not a strike in any ordinary connotation of that term.*" (Italics supplied.)

The Court accepted the definition of a strike as contained in the American-English Encyclopedia of Law, Vol. 24, page 123, as follows:

"The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted."

It then went on to state:

"We think it is a novel theory that the mere refusal to cross a picket line, in the absence of any other activity, makes the one who refuses a party to the strike, but even so, as already shown, such refusal was not for the 'mutual aid or protection' of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees, and, consequently, could have obtained nothing from respondent for their benefit. * * * Other than the incidents which we have discussed, there is not a scintilla of

> proof that respondent interfered in any form or manner with the right of its employees to join a labor organization of their own choice, or that it refused to bargain collectively with th agents selected by such employees. * * * There is no evidence of any hostility or favoritism on behalf of respondent against or for any union."

In that case, as in the one at hand, there is no evidence that the employee in question acted in combination or concert. Each acted in his own individual capacity. The refusals to cross the picket line were a matter of principle and their object was merely to support the grievances of others. Waugh could not have acted in concert with his union in this case, since, as the Court below found, that would have been a violation of § 8(b)(f) of the Taft-Hartley Act, and would have rendered his union guilty of an unfair labor practice under that section (R. A. 19). Hence, the actions of Waugh and of the eight supervisors in the *Illinois Bell Tel. Co.* case could not possibly have constituted a strike.

In the case at hand the issue is even more clear-cut. Waugh was not a member of the striking union; the picket line was not before the plant in which he was employed; the evidence does not indicate that the respondent interfered in any form or manner with Waugh's right to join a labor organization of his own choice, or that the respondent showed any hostility or favoritism for or against any union. Thus respondent was merely attempting to operate his business in accordance with the terms of its union contract without suffering economic damage from causes beyond its control. It cannot and has not been claimed that this employer was attempting to influence his employees in their choice of a bargaining representative, nor that he was

discriminating among his employees due to union activity. His only crime was in attempting to maintain his business operation in the face of labor turmoil at one of his customers' plants. The protection of the Labor-Management Relations Act of 1947 has never been stretched to the length for which the Board now contends.

Therefore, our attention is focused to the same issue as has already been decided by the Seventh Circuit and on which question this Court has previously denied certiorari; that question being whether or not it is a violation of Section 7 of the Act or an unfair labor practice under Section 8(a)(1) or 8(a)(3) for an employer to discipline an employee who refuses to perform his regular duties on the grounds that he will not cross a picket line maintained by a union of which he is neither a member nor with which he has a common cause. Although the Court was not willing to accept the Board's contention that the employees in that case engaged in "concerted activities" within the meaning of the Act, it stated that that assumption would have had no bearing upon its decision, since accepting that proposition they still could not find that those activities were for their "mutual aid or protection". The Court states at page 128, *supra*:

> "* * * They neither sought nor were entitled to seek on their own behalf any aid or protection from respondent. * * * In other words, these employees were without right to bargain with respondent or to strike because of any grievances which they had or for their own aid or protection, but they had such right, according to the Board, in behalf of employees of a different unit and represented by a different bargaining agent."

The Court then quotes from *National Labor Relations Board* v. *Draper Corp.*, C. C. A. 4th, 145 F. 2d 199, 202:

> "The purpose of the Act was not to guarantee to employees the right to do as they please, but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

However broad the principles of the picket line and whatever custom may attach to that particular method of persuasion, rights of employees under the Act are limited by the language of the Act. In both its language and underlying policy, the Act speaks in terms of a particular employer-employee relationship to be regulated, and does not require an employer to defer the conduct of his daily operation to abstract concepts of labor solidarity. Obviously, so broad a right as that claimed by the Board could not have been conferred merely by implication. In the fact of the express language of the Act and the clear underlying policy which pervades it, the Board urges a tortured interpretation as the basis for its application for a writ of certiorari. It is sufficient to state that the interpretation for which the Board contends has never been made by any Court in the sixteen-year history of Section 7.

The employee rights for which the Board contends are practically unlimited in scope—they would include the right of employees to assist or participate in any national or local labor dispute in any manner deemed appropriate, regardless of how such participation or assistance may derogate from the daily operation of an employer's business. It is difficult to conceive that so broad and drastic a right exists without specific legislative authorization or that it should have lain dormant through the sixteen stormy years of the Act's history.

Conclusion.

The petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit should be denied.

Dated: New York, N. Y., October 2, 1952.

Respectfully submitted,

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Appendix.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices.

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer

in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees

in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: *Provided*, that nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are on vacation, any district court of the United

States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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ARGUMENT:

1.—An employee is not engaged in a concerted activity for mutual aid and protection when he refuses during the normal course of employment to cross a picket line established by an unrelated union, where the refusal is based on his own sentiment, is not directed by his union, is not designed to make common cause with the picketing union, and is in all other respects an individual decision and an individual act

Summary

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ROCKAWAY NEWS SUPPLY CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

The petitioner seeks a review under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, of a decree of the Circuit Court of Appeals for the Second Circuit, entered on August 8, 1952 (R. 73-80), denying enforcement to and setting aside an order issued by the National Labor Relations Board against Rockaway News Supply Co., Inc. (R. 10-14). Petition for Certiorari was filed on September 5, 1952 and Certiorari was granted on October 27, 1952.

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit were filed on May 12, 1952 (R. 73-80), and are reported at 197 F. 2d 111. Findings of fact, conclusions of law and order of the National Labor Relations Board (R. 7-36) are reported at 95 NLRB 336.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

Question Presented.

Whether an employer violates the National Labor Relations Act in discharging an employee, not in order to discourage union membership or in manifestation of a desire to obstruct unionization, but because the employee refuses to perform those parts of his normal duties which involve crossing a picket line of a union other than his own, at a place of business other than that of his employer.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. iv-vii.

Statement of the Case.

The material facts of this case are not in dispute. The Respondent discharged an employee (hereinafter referred to as "Waugh") who refused to perform those phases of his normal duties which involved crossing a picket line set up by an unrelated union at a place of business owned and operated by an unrelated employer. From a holding by the United States Court of Appeals for the Second Circuit, to the effect that this discharge did not violate the National Labor Relations Act, the Petitioner, the National Labor Relations Board, which had previously ruled to the con-

trary, has brought this proceeding. It should be mentioned here that the Court of Appeals for the Seventh Circuit had at an earlier date reached a result similar to that reached by the Second Circuit in this case (*N. L. R. B.* v. *Illinois Bell Telephone Company*, 189 F. 2d 124, cert. den. 342 U. S. 885 (1951)).

The incident leading to this litigation occurred in the context of a strike called by the Nassau County Typographical Union against the publishers of the Nassau Daily Review *Star*. In connection with its strike, the Typographical Union set up a picket line at the plant of the Daily Review Corporation, Long Island, New York. Respondent is in the business of wholesale distribution of New York newspapers and nationally circulated magazines, and was the sole vehicle of circulation on Long Island of these products as well as of the *Star*. Respondent's normal business, and Waugh's normal duties, involved the picking up of copies of the *Star* at the Long Island plant for delivery elsewhere. On the morning of March 2, 1950, Waugh informed his foreman that a picket line had been established at the *Star* plant[1] and that he would not cross the picket line to pick up any newspapers there. Waugh remained at the Valley Stream, Long Island, plant of Respondent while another member of the same Union was sent to Rockville Center, Long Island, picked up the *Star*, returned to Valley Stream, making a total trip of ten miles, and turned over the papers to Waugh, who then proceeded to make delivery of them according to his regular routine (R. 45-46). When Waugh refused to pick up the *Star* on the following day, March 3, 1950, the foreman, at Waugh's suggestion, took a truck into the plant, loaded it and drove it outside the

[1] The formal action for a picket line was taken on November 9, 1947 by the Nassau County Typographical Union. Pickets were first established on March 1, 1950. (See testimony of J. J. Byrnes —R. 53.)

Star plant to where Waugh was standing, immediately beyond and in sight of the picket line. Waugh took the newspapers, mounted the truck, and made his normal delivery.[2] On Tuesday, March 7th, the day on which Waugh was next regularly scheduled to make a pick-up at the struck plant, he again refused to perform those parts of his duties which involved entering the *Star* plant. On this occasion the foreman declared that Waugh would either have to perform all his duties, including picking up the newspapers as well as delivering them, or be fired. Waugh chose not to pick up the *Star*, and was discharged. Made the subject of a grievance, by Waugh's Union (The Newspaper and Mail Deliverers' Union of New York and Vicinity), the discharge went to arbitration, pursuant to the collective agreement between Respondent and the Union. The Arbitration Board held that "the act of Charles Waugh in refusing to obey the order of the foreman on March 7, 1950, constituted just cause for discharge."

Subsequently, in a complaint proceeding under the National Labor Relations Act, as amended, instituted by Waugh, not by his Union, the National Labor Relations Board held that Respondent's discharge of Waugh amounted to a violation of Sections 8(a)(1) and (3) of the National Labor Relations Act. The Board's position was that by the discharge the Respondent had both interfered with, restrained, and coerced Waugh in the exercise of the

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[2] Testimony of Charles M. Waugh called by and on behalf of the General Counsel for the National Labor Relations Board:

> ". . . So I told Mr. Gordon, I says, 'Well, there's the picket. I can't go across the line.' 'But,' I said, 'if you want to,' I says, 'you take my truck, load it with papers and bring it back into the street and I will deliver the papers.' And that was the procedure as I stated. Mr. Gordon took the truck across the picket line, put the six or seven bundles in the truck, drove the truck into the middle of the street, and then from there on I took the truck containing the newspapers and went about my daily work."

right to engage in concerted activity for mutual aid and protection, and discriminated against him to discourage membership in a labor organization.

On petition for enforcement of the Board's order, the Court of Appeals for the Second Circuit, Clark, J., dissenting, held that the discharge violated neither Section 8(a)(1) nor Section 8(a)(3) of the Act. Waugh's refusal to cross the picket line may have been a concerted activity, the Court observed *arguendo,* but it was not the type of concerted activity which the Act is designed to make immune to employer discipline imposed simply in the interests of orderly and efficient conduct of business. Furthermore, the Court ruled, there was no basis for a decision that the discharge violated Section 8(a)(3) of the Act, which makes it an unfair practice for an employer to encourage or discourage membership in any labor organization by discrimination in hire or in tenure, terms or other conditions of employment. Presumably this ruling was based on the obvious fact that in the circumstances of this case neither the object nor the effect of the discharge could have been to encourage or discourage Waugh's membership in either his own or the striking union. For all practical purposes the Board has abandoned any objection to this ruling. In Petitioner's brief submitted to this Court the only reference to Section 8(a)(3) appears in footnote 33 on page 66 and no argument is directed against the Second Circuit's finding on 8(a)(3).

Summary of Argument.

The discharge of Waugh may be held unlawful only if it is shown to be in violation either of a specific provision (or provisions) of the National Labor Relations Act, or of the general policy and intent of the Act. Neither can be shown.

A discharge of the kind involved in this case, occurring in the instant context and clearly motivated, not by anti-union considerations, but by good-faith business considerations, violates no specific provision or provisions of the Act. More than that, only a profound misunderstanding of the general intention of Congress could produce the conclusion that such a discharge somehow conflicts with the general policies and purposes of the Act. Specifically, we argue:

I. That Waugh was not engaging in a concerted activity for mutual aid and protection at all when he was discharged, and that, therefore, the discharge could not have interfered with, restrained, or coerced him in the exercise of the statutorily protected right to engage in certain concerted activities.

II. That even if Waugh's activity may properly be considered "concerted", it is not the type of concerted activity which absolutely privileges the actor against reasonably and lawfully motivated discipline by the employer.

III. That it is impossible to view the discharge of Waugh as involving discrimination in employment intended to discourage union membership within the meaning of Section 8(a)(3) of the Act and of the uniform and prevailing course of decision thereunder.

IV. That the discharge of Waugh was a discharge for cause, justified by previous dealings and existing contractual arrangement between Waugh's union and the Respondent as well as by the implicit employment contract between Waugh and the Respondent.

ARGUMENT.

I.

An employee is not engaged in a concerted activity for mutual aid and protection when he refuses during the normal course of employment to cross a picket line established by an unrelated union, where the refusal is based on his own sentiment, is not directed by his union, is not designed to make common cause with the picketing union, and is in all other respects an individual decision and an individual act.

Summary.

The Petitioner's principal contention is that Waugh's refusal to cross the picket line established at the *Star* plant amounted to a concerted activity within the meaning of Section 7 of the Act, and that, therefore, in discharging Waugh, the Respondent violated Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights granted in Section 7, including the right to engage in concerted action for mutual aid and protection. The narrowest issue raised by this contention is whether a refusal such as Waugh's—dictated entirely by personal considerations and executed entirely on an individual basis, with neither sanction nor cooperation of others in his own union—may properly be regarded as a concerted activity at all. This Court has not yet passed definitively upon the precise issue. Nevertheless, Respondent respectfully submits that sensible analysis, the opinion of this Court on a closely related issue, a carefully reasoned decision by the Court of

Appeals for the Seventh Circuit on the identical issue, and a large number of other decisions on related subjects all point to the accuracy of the contention that a refusal to cross a picket line in the circumstances of the present case is not a concerted action for mutual aid and protection within the meaning of the National Labor Relations Act, as amended.

A. The decision to refuse to cross the picket line in this case was an individual decision based on personal sentiment, a decision contrary to that reached by fellow employees performing similar work, and a decision which, viewing all the facts, indicated that the person reaching it did not intend to make common cause with the picketing Union.

Before engaging in legal analysis, it will be well to set forth the record facts concerning Waugh's refusal to cross the Typographical Union's picket line. In its decision in this case, the Board declared that "in refusing to cross the Typographers' picket line Waugh was making common cause and acting in concert with the Typographers" (95 NLRB 336, 338). The record does not support such a conclusion. On the contrary, the record discloses that Waugh was uninterested in the striking union's objectives. This fact is made evident by Waugh's readiness to deliver copies of the *Star*, once someone else had brought them to him from the struck premises. When asked at the hearing whether he objected "to delivering papers that were given to you by another union man who had crossed the picket line", Waugh's reply was an unequivocal "no" (R. 67). Waugh repeatedly stated that he refused to enter the *Star* premises because he did not want to be known as a "scab" (R. pp. 20, 45, 65). Surely reality must be distorted when, in such circumstances, it is asserted that Waugh made "common cause" with the Typographers. The immediate objective

of the Typographers in striking and establishing a picket line was to prevent the production *and the marketing* of the *Star*. When Waugh showed himself ready to deliver the *Star*, he demonstrated that he had no intention of making "common cause" with the Typographers.[3] Accurately viewed, his decision to refuse to cross the picket line, his reluctance to be called a "scab," reflected nothing more than the fundamentally inexplicable forces which tend to induce some men to "steer clear" of embarrassing situations. When the Board declared that Waugh made "common cause" with the Typographers, it engaged in an oversimplification, useful only to make the "facts" of the case conform to the Board's formula, but ultimately betrayed by the real circumstances surrounding Waugh's conduct. It is plain that Waugh was not engaging in an activity with the Typographers, to use the words of Section 7, for "mutual aid and protection".

It is equally plain that Waugh's conduct was of a solitary or individual, not of a collective or concerted, kind. The record shows that at least five of Waugh's fellow employees, assigned similar duties, did all the work normally required of them, including that involving the crossing of the picket line established by the Typographical Union in the same dispute (R. 56). The record is barren of any indication that Waugh's union either suggested or approved his refusal to do his job.

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[3] See R. 67, cross examination of Charles Waugh:

"... Q. And you made delivery of those papers?

A. Correct.

Q. So that actually you did not object to delivering papers from a strike-bound plant; is that correct? A. No.

Q. You only objected to your crossing the picket line? A. Exactly.

* * * * * * *

Q. But you did not object to delivering papers that were given to you by another union man who had crossed the picket line? A. No."

Taken together, the foregoing facts establish Waugh's refusal as an individual act based on individual sentiment; he did not act in concert with his own fellow-employees or with his own union. That being so, in order to characterize his conduct as "concerted," it is necessary to assert that he acted in concert with the Typographers Union. But such an assertion becomes speedily untenable when confronted by the fact that Waugh had no intention of making common cause with that union. Thus the indicated conclusion would seem to be either that Waugh was not engaged in a concerted activity at all, or that, if one insists upon his conduct's being viewed as "concerted", it was not concerted activity for "mutual aid and protection".

B. An individual refusal to cross a picket line in the circumstances presented by this case is not a concerted activity for mutual aid and protection within the meaning of Section 7.

Section 7 of the National Labor Relations Act provides in material part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Whether or not Waugh's refusal to cross the Typographical Union's picket line is an activity covered at all by Section 7 is one of the principal issues in this case.

The Board seeks to establish Waugh's refusal as a Section 7 activity by emphasizing the word "assist" in the first clause of Section 7. However, careful analysis of the structure of Section 7 discourages the attribution of so broad a meaning to this word "assist" as to hold that it covers a refusal to cross a picket line such as is

involved in this case. The word "assist" occurs in series with the words "form" and "join", following the declaration of employee rights to self-organization. This seriatim arrangement suggests that Congress was concerned with elaboration of the same concept in using all three words, and the persuasive conclusion is that Congress was preoccupied here with insuring a comprehensive definition of the right of employees to affiliate themselves with a union; that the words "form", "join" and "assist" were utilized by Congress to give content to the immediately preceding "right to self-organization". Cf. *Mason* v. *U. S.*, 260 U. S. 545, 553 (1923); *Russell Motor Car Co.* v. *U. S.*, 261 U. S. 514, 519 (1923). Although a search of the legislative history has turned up nothing definitive on the point,[4] the

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[4] *Cf. Sen. Rep. No. 573*, 74th Cong. 1st Sess. (1935) and H. R. Rep. No. 1147, 74th Cong., 1st Sess. (1935). The Senate Report (at p. 8) contains this rather significant language, in reference to Sections 7 and 8 of the Wagner Bill: "These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8. . . . Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair."

Time after time this Report emphasizes the point that Congress intended in the Wagner Act no more than to eliminate and to proscribe *anti-union* activities of employers. Thus: ". . . the bill [does not] . . . interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as . . . they are not used as a covert means of discriminating against or in favor of membership in any labor organization." *(Id.* at 10) and again: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in dis-

conclusion is fortified by our analysis of the general scheme of Section 7 (Point II A, *infra*), and by the fact that the Board has never heretofore thought that the word "assist" was the factor which brings a refusal to cross a picket line within Section 7. Thus, in *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board referred to such a refusal as "a protected form of concerted activity", and in its decision in the present case the Board used this language:

> "The fact that employees who participate in concerted activities are not members of the same union, or indeed of any union, or employees of the same employer, does not alter the concerted nature of such activity." (R. p. 10).

If Waugh's refusal to cross the picket line is to be regarded as a Section 7 activity in any sense, then, it must come within the terms "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

As already observed it is virtually impossible as a matter of straightforward general analysis of language and meaning to characterize Waugh's conduct as concerted action for the purpose of mutual aid and protection. The facts of the case simply do not yield naturally to such a characterization. In fact, the opinion of this Court in a significantly similar case suggests that it is never proper to characterize an individual refusal by a truck driver to cross another union's picket line as a form of concerted action. In *N. L. R. B.* v. *International Rice Milling Company*, 341 U. S. 665 (1951), the issue was whether or not a union

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criminatory treatment or loss of the opportunity for work." (*Id.* at p. 11.) For more extensive documentation of the same point from the legislative history of the Wagner Act, see *Smith, The Evolution of the "Duty to Bargain" Concept in American Law*, 39 Mich. L. Rev. 1065 (1941); *Latham, Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 Geo. Wash. L. Rev. 433 (1936).

violates Section 8(b)(4)(A) of the National Labor Relations Act simply because a picket line which it has established induces an unrelated truck driver to refuse to enter the picketed premises. If it could have been realistically held that a picket line constitutes an inducement to concerted action by a truck driver, this Court would have been obliged to rule that the picketing union in *Rice Milling* had violated Section 8(b)(4)(A). But the Court held that the union had not violated the Act, and in so holding it relied mainly on its conclusion that the truck driver had not been induced to concerted action. "* * * the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity", the Court stated, "as the section proscribes". (*Id.* at 670) The Court went on to say that "the applicable proscriptions of Section 8(b)(4) are expressly limited to the inducement or encouragement of *'concerted* conduct by the employees of the neutral employer." "That language", the Court concluded, "contemplates inducement or encouragement to some concert of action greater than is evidenced by the pickets' request to a driver of a single truck to discontinue a pending trip to a picketed mill." (*Ibid.* at 670-71; italics are the Court's.)

If the term "concerted" does not cover the conduct of a single truck driver in refusing to cross a picket line, for purposes of Section 8(b)(4), it would seem anomalous to hold that it covers the conduct of a single truck driver for purposes of Section 7 and Section 8(a)(1). There is no evident basis for the assumption that the concept of concerted action entertained by Congress varied between these two sections, and we commend to the Court the ancient though still useful maxim that the same word should be given the same meaning where used in different sections

of a single piece of legislation unless the respective contexts reasonably establish an intended shift in meaning.

Shortly prior to the announcement by this Court of its decision in *Rice Milling*, the Court of Appeals for the Seventh Circuit reached precisely the same conclusion concerning the absence of the quality of concert in individual refusals to cross a picket line. The case, *N. L. R. B.* v. *Illinois Bell Telephone Company*, 189 F. 2d 124, cert. den. 342 U. S. 885 (1951), involved a demotion of eight employees for refusing to report to work where reporting would involve the crossing of a picket line. There, as in the present case, the decisions to respect the picket line were reached individually, and the refusals were separately and individually executed. There as here the picketing union was not the bargaining representative of the employees who respected the picket line, and the objectives of the picketing union were not the objectives, at the time, of the union which was the exclusive bargaining representatives of the employees who respected the picket line. Unlike the situation in the present case, however, several of the persons who were demoted in *Illinos Bell* were actually members of the union whose picket line they respected, even though they were not employed in a bargaining unit in which that union was exclusive representative. Again unlike the present case, the picketing union there was closely affiliated with the union which was bargaining representative for the persons who respected the picket line. These distinctions add up to a stronger case for holding the refusals to cross the picket line in *Illinois Bell* a concerted activity for mutual aid and protection than the refusal involved in the present proceeding, if, indeed, any case at all can be made for the Board's proposition. Nevertheless, the Seventh Circuit held in a closely reasoned opinion that the refusal in *Illinois Bell* was not a concerted activity, or in any event

not a concerted activity for mutual aid and protection within the meaning of Section 7; and therefore that the employer did not violate Section 8(a)(1) in demoting the employees who had chosen to respect the picket line.

It is interesting to note that the Seventh Circuit found especially significant in *Illinois Bell* facts concerning the motivation of the demotees there which are almost perfectly duplicated by the known motivation of Waugh in refusing to cross the picket line established by the Typographers Union. The Court pointed out that:

> "There is no evidence that these eight employees acted in combination or concert. They did not converse with each other or any other person regarding the activity in which they engaged, that is, a refusal to cross the picket line. The record discloses unmistakably that each acted in her own individual capacity." (*Ibid.* at p. 127.)

Here too the record unmistakably discloses that Waugh acted as an individual; group sanction or action was completely absent.

This is not to argue that the only type of activity protected by Section 7 is group action. It is established that individuals, even when acting alone, are engaged in concerted action for mutual aid and protection in many instances. So where an employee representative is discharged because he has appeared before a legislative body, the discharge is an unfair labor practice, *Bethlehem Shipbuilding Corp., Ltd.* v. *NLRB* (C. A. 2, 1940) 114 F. 2d 930; or where an individual employee is discharged for circulating a petition for additional overtime, *NLRB* v. *Schwartz* (C. A. 5, 1945) 146 F. 2d 773; or where an employee has initiated a petition to improve working conditions, *NLRB* v. *Austin Co.* (C. A. 7, 1947) 165 F. 2d 592.

However, the significant burden of such cases is that in each instance the individual action was inextricably associated with group welfare in which the actor had an immediate self interest. Cf. *Phoenix Mutual Life Insurance Co.* v. *NLRB* (C. A. 7, 1948) 167 F. 2d 983, cert. den. 335 U. S. 845. Where, as in the present case, the dischargee is concerned as an individual with a strictly individual sentiment or interest, or even where a group interest is involved but may not be characterized as a legitimate labor objective, the rule is different, and rightly so. Thus in *Joanna Cotton Mills* v. *NLRB* (C. A. 4, 1949) 176 F. 2d 749, the Fourth Circuit held that an individual employee is not engaging in concerted activity for mutual aid and protection every time he circulates a petition which has something to do with working conditions. If the ultimate object in circulating the petition is to vent one's spleen upon a supervisory employee, the Court ruled, the statutory concept of mutual aid and protection is not fulfilled. In this decision the Fourth Circuit advanced precisely the theory of Section 7 which we now urge upon this Court:

> "The words 'concerted activities' are limited in meaning by the words with which they are associated . . ., which have relation to labor organization and collective bargaining, and by the purpose of such 'concerted activities', which is expressly limited by the immediately succeeding language, to concerted activities 'for the purpose of collective bargaining or other mutual aid or protection' . . . We agree that the 'concerted activities' protected by the Act are not limited to cases where the employees are acting through unions or are otherwise formally organized. It is sufficient that they are acting together for mutual aid or protection . . . It is clear, however, that to be protected the purpose of the concerted

activities must be the mutual aid or protection of the employees." (*Ibid.* at pp. 752-754).

The Petitioner is accustomed to asserting that a refusal to cross a picket line is within Section 7 (see for example Petitioner's brief pp. 33-34) precisely because it is a traditional manifestation of labor solidarity, and therefore *par excellence* an example of concerted action for mutual aid and protection, even on the theory of Section 7 advanced by the Fourth Circuit in such cases as *Joanna, supra.* See *Cyril de Cordova,* 91 N. L. R. B. 1121. Respondent respectfully submits that this assertion is an unsound and inaccurate over-generalization, that it is based upon a misconception of both the policy of the National Labor Relations Act and the specific role of Sections 7 and 8(a), and that it unjustifiably vitiates an equally traditional right of employers which common understanding, Congressional intent, and the decisions of this Court, other courts, and the Board itself in a multitude of cases have always assumed to have been preserved in the National Labor Relations Act.

C. The fact that an activity is traditional in the Labor movement does not mean that it represents an absolute right or that it is a Section 7 activity universally superior in legal status to the equally traditional right of employers, left intact by the Act, to impose normal and lawful discipline in the interests of efficient operations.

We shall argue in Points II and III *infra,* that the structure of both the original and the amended Act and the main stream of judicial construction thereunder establish a distinction between employer conduct which is anti-union in basic design and employer conduct which is oriented in terms of efficient business operations—with the former prohibited by the Act and the latter left unimpaired. However,

effective consideration of certain phases of Petitioner's brief makes it necessary to anticipate a portion of that analysis at this point.

1. The Board's Theory of Analysis of the Act, Making Every Traditional Type of Labor Union Conduct absolutely Immune to Employer Discipline, has been Rejected by the Court as Repeatedly as it has been Advanced.

Petitioner has devoted a substantial part of its brief (pp. 17-35) to a double correlation—a correlation, on the one hand, of Sections 2(3), 2(9), and 7 of the National Labor Relations Act; and, on the other, of the National Labor Relations Act as a whole and the Norris-LaGuardia Act. Stripped of all subtleties and complications, this double correlation is designed to establish one point: that all the traditional labor activities either made immune to injunctive relief by the Norris Act or referred to in the National Labor Relations Act, however generally, incidentally, or indirectly, fall within the protection of Section 7. In order to put this contention in proper perspective it is necessary to note that the Board has offered the same theory of construction to the Court, in a variety of costumes, since the earliest days of the Wagner Act. The tenacity with which the Board has advanced this theory of construction, in one form or another over the years, can be properly evaluated, however, only in the light of the consistency with which this Court has rejected the theory, in whatever form presented, over the years.

Section 2(3) of the Act provides in part that the term "employee" includes any person "whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." Section 2(9) states that the term "labor dispute" includes "any [labor] controversy . . . regard-

less of whether the disputants stand in the proximate relation of employer and employee." Toward the beginning of its analysis, the Petitioner correctly observes that these definitions merely establish the physical coverage of the Act, and that specific employee activity is immunized only if it "falls within the category of activities enumerated in Section 7." (Petitioner's brief pp. 18-19) But then in the ensuing pages of Petitioner's brief the reader is informed that subdivisions (3) and (9) of Section 2 define, not only the physical coverage of the Act, but also the scope of substantive protection afforded by Section 7. Shortly after having said that those subdivisions merely spell out the area of human action in which the National Labor Relations Act was to be operative, the Petitioner says: "The very purpose of those provisions was to protect employees who cease work in support of another labor organization in whose dispute neither they nor their employer have an immediate interest. To deny protection to such activity simply because it involves a work stoppage is to frustrate the clear will of Congress" (*Id.* p. 25; see also p. 40).

In short, Petitioner's theory seems to be that if an employee's conduct is described in Sections 2(3) and 2(9), it is made absolutely immune by Section 7 to any form of employer discipline, regardless of the circumstances in which the discipline is imposed. So, if an employee ceases work in connection with a labor dispute, under the Board's theory, that employee is immune to disciplinary action.

A variation of this theory was first presented to the Court in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), with the Board then urging that strikers who had ceased work in connection with a current labor dispute remained employees within the meaning of Section 2 (3). The undivided Court in *Mackay* provided the key

to the present case and the definitive explanation of the function of Section 2 (3). It pointed out that Section 2 (3) gives economic strikers no greater and no less—but precisely the same—status which other employees possess. In remaining employees, the Court held, strikers have exactly the same rights as employees who have not struck: that is, the right not to be coerced or discriminated against. With this feature of *Mackay* we deal in detail at pp. 58 *et seq.* For present purposes, however, we need note that *Mackay* made it clear that even complete economic strikers have no guaranteed job security merely by virtue of their retention of the abstract "employee status" defined in Section 2 (3).

The Board advanced another variation of its present theory in *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939). There, going beyond the replacement of strikers which *Mackay* involved, the employer had taken the positive step of discharging certain employees who had taken possession of a factory in connection with a strike. However, in *Fansteel*, as in *Mackay*, work had ceased in connection with a current labor dispute, and the Board insisted that under the circumstances the discharge was unlawful. This Court again rejected the Board's contention. *Fansteel* thus reaffirmed the principle that the mere ceasing of work in connection with a current labor dispute does not carry with it a guaranty of job security, and it went on to establish that the employer might even take the affirmative step of discharging employees in certain circumstances, notwithstanding the fact that they had ceased work in connection with a current labor dispute.

The Board offered its present theory in still another dress in *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939). There the contention was that the employer violated the

Act in discharging employees who had forced a shutdown in an effort to impose employment conditions at variance with those established in a collective agreement. Unlike *Fansteel,* the employee action in *Sands* did not involve egregiously unlawful conduct, if indeed it could be regarded as unlawful conduct in any sense in a day when the legal status of the collective agreement was considerably more dubious than it is today. *Cf. Sen. Rep. No. 105 on S. 1126, 80th Cong.,* 1st Sess. pages 15-18. Yet this Court affirmed the holding of the Court below, which held that the Board had erred in ruling that Section 2(3) established the discharge as unlawful. It is interesting to note in the present connection that the Court below spoke of Section 2(3) in the following terms:

> "* * * Section 152 (3), Title 29, U. S. C., provides 'The term "employee" shall include any employee * * * whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice.* * *' The controversy here was a current labor dispute within the definition of Title 29, Section 152 (9). But the statute does not provide that the relationship held in *statu quo* under Title 29, Section 152 (3), shall continue in the absence of wrongful conduct on part of the employer and of rightful conduct on the part of the employees. If such were its meaning, the right of the employer to select and discharge his employees * * *, which still exists in absence of intimidation or coercion in violation of the statute, would be cut off." (C. A. 6, 1938) 96 F. 2d 721, 726.

Similar attempts by the Board to purvey its present theory, or minor variations thereof, met with similar rebuffs from the Court in *Southern Steamship Co.* v. *N. L. R. B.,* 316 U. S. 31 (1942), and more recently in *Interna-*

tional Union, U. A. W., A. F. L. v. *W. E. R. B.*, 336 U. S. 245 (1949), petition for rehearing denied, 336 U. S. 370 (1949). In each of these cases, the Court reaffirmed the principle that ceasing work in connection with a current labor dispute does not automatically establish the existence of a Section 7 activity.

Each of the foregoing cases involved genuine, concerted strike action. In each, therefore, Sections 2 (3) and 2 (9) were positively, directly and explicitly relevant. Taking these cases either individually or collectively, they establish that an activity is not necessarily entitled to the protection of Section 7 no matter how squarely it falls within Sections 2 (3) and 2 (9). Yet, in spite of this uniform course of decision by the Court, involving both the reversal of Board decisions and the rejections of arguments by the Board on appeal, the Board has once again presented the contention that the scope of Section 7's protection is necessarily geared to the activities described in Sections 2 (3) and 2 (9). In fact, the theory of construction is offered here in an even more extreme form than it has ever previously been displayed. For the Board is urging here that Sections 2 (3) and 2 (9) bring Section 7's protection, not only to the strike action with which they expressly deal, but also to all the forms of traditional labor action which might conceivably fall within the language of either those definitions or the Norris-LaGuardia Act.

Petitioner relies heavily on Section 4 of the Norris-LaGuardia Act for support of the contention that all traditional labor activities are absolutely protected by Section 7 of the National Labor Relations Act, as amended. Section 4 of the Norris-LaGuardia Act is a catalogue of the various types of labor action which, when they occur in a "labor dispute," may not be enjoined by the federal courts in a

suit brought by a private party. Among the types of conduct made thus unenjoinable by Section 4 are strikes, picketing, boycotts, and, in general, virtually every kind of non-violent labor conduct, including respect for picket lines, strikes in violation of agreements, "secondary boycotts", and so on. Waugh's conduct undoubtedly falls within Section 4 of the Norris-LaGuardia Act.

Petitioner's position is that Section 7 of the National Labor Relations Act should be read to some undefined extent as positively protecting against employer discipline all the types of activities which are made immune by the Norris-LaGuardia Act to the injunctive processes of the federal courts (Petitioner's brief, pp. 29-35, especially pp. 33-35).

As Petitioner recognizes, this cannot possibly be advanced seriously as a general proposition at the present time, when the National Labor Relations Act, as amended, has made positively unlawful certain of the activities which Section 4 of the Norris Act took from the equity jurisdiction of the federal courts. Nevertheless, Petitioner insists that activities immunized against injunctive relief by Section 4 of the Norris Act and still not made unlawful by the Taft-Hartley Act remain entitled to the total immunity afforded by Section 7 of the National Labor Relations Act. (Petitioner's brief, p. 35 *et seq.*). We deal in detail in Point IIB4, *infra*, with so much of Petitioner's present argument as is based on the proviso to Section 8 (b) (4). It is desirable at this juncture, however, to demonstrate the fundamental error in the general view that all the labor activities made immune to injunctive processes by Section 4 of the Norris Act and not positively outlawed by the Taft-Hartley Act are entitled to the complete protection of Section 7 of the latter Act.

The error becomes apparent immediately upon realization that a strike in violation of the collective agreement is made unenjoinable by the Norris Act. *Alcoa Steamship Co.* v. *McMahon* (C. A. 2, 1949), 173 F. 2d 567; *Third Avenue Transit Corp.* v. *Quill* (C. A. 2, 1951), 192 F. 2d 971. *Cf. Amazon Cotton Mills* v. *Textile Workers Union of America* (C. A. 4, 1948) 167 F. 2d 183; *International Longshoremen's Union* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119.

If the Board's current contention were sound, it would follow that an employer may not discharge employees who participate in a strike in violation of a collective agreement, since such a strike is unenjoinable under the Norris-LaGuardia Act and not declared unlawful by the Taft-Hartley Act. The law is, however, precisely to the contrary. Ever since this Court's decision in *Sands, supra,* it has been accepted that employers do not violate Sections 7 and 8 of the National Labor Relations Act in discharging employees who participate in a strike in violation of a collective agreement. In its decisions since enactment of the Taft-Hartley Act, the Board itself has followed the rule of the *Sands* case. Cf. *National Electric Products, Inc.*, 80 NLRB 995 (1948); *Stockham Pipe Fittings Co.*, 84 NLRB 629 (1949); *Granite City Steel Co.*, 87 NLRB No. 122 (1949).

It would serve no useful purpose to amass additional authority for the point that not every traditional labor activity made unenjoinable by Section 4 of the Norris-LaGuardia Act is entitled to the complete protection of Section 7 of the National Labor Relations Act. The Board has itself held that there is a species of labor conduct which may not claim the protection of Section 7, even though it does not violate the N. L. R. A. as amended. *Perry Norvell Co.*, 80 NLRB 225 (1948). But the more important point at the present moment is that there is absolutely no justifica-

tion for a correlation of the kind proposed by the Board. The Norris-LaGuardia Act and the National Labor Relations Act lack the essential identity and the common design which induced this Court, in *U. S.* v. *Hutcheson,* 312 U. S. 219 (1941), to correlate the Norris-LaGuardia Act with the Clayton Act. The Norris-LaGuardia Act and the Clayton Act both dealt with the same problem, the availability of injunctive relief in labor disputes. Their approaches, even their substantive provisions, were virtually identical. But the Wagner Act was concerned with a phase of labor relations with which the Norris Act did not even purport to deal, viz., the use by employers of their economic power to inhibit and to frustrate employee self-organization. Moreover, it must be remembered that the controlling law today is not the Wagner Act, but the Taft-Hartley Act. And it seems sound to say that the Taft-Hartley Act has even less in common with the Norris Act than the Wagner Act had.

Petitioner's effort to establish the scope of Section 7's protection by mechanical reference to Sections 2 (3) and 2 (9) of the National Labor Relations Act and to Section 4 of the Norris Act is a flight to the abstract and the technical induced by the difficulties which the hard facts of this case throw in the way of a holding that Waugh was engaged in a "concerted action for mutual aid and protection." Because it is difficult realistically to view Waugh's conduct as involving "mutual aid and protection", Petitioner is compelled to a tortuous process of strenuous construction. And the result, as this Court put it in *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 191 (1941), is "a bit of verbal logic from which the meaning of things has evaporated."

The only ground upon which the Board can straightforwardly support its contention that Respondent committed an unfair labor practice is that conduct such as Waugh's, simply because it is traditional conduct for union

men, carries with it the complete negation of the right of employers to use normal forms of discipline in pursuance of normal business objectives. Mature consideration of the statutory scheme, the relevant authorities, and the important problems of policy which this case raises will indicate that such a proposition, when fully appreciated, must be rejected.

2. Unqualified protection of respect for picket lines involves the negation of a right of employers which the Act has not only left unimpaired but has expressly confirmed.

No one can reasonably dispute the statement that refusals to cross picket lines are traditional in the labor movement in this country. Few will even dispute the assertion that in a proper case a refusal to cross a picket line may be a concerted activity for mutual aid and protection which is immune to employer discipline. Thus, in an analysis of the *Illinois Bell* case, *supra*, one writer has said that "the [Seventh Circuit's] approach does not give employers *carte blanche* to discipline or discharge employees who refuse to cross a picket line. In fact, employers receive only an extremely limited benefit from the decision." *Petro, National Labor Policy and Respect for Picket Lines*, 3 Labor L. J. 83, 87 (1952). This writer goes on then to define a number of common instances in which a refusal to cross a picket line would be immune to employer discipline —all, however, instances in which the objective of the picket line has some bearing on the rights or working conditions of the individual employee involved.[5] *Cf. N. L. R. B.* v.

[5] "In the first place, the court's approach [in the *Illinois Bell* case] would not justify a discharge where an employee in an unorganized plant respected a picket line set up by fellow workers in either an organizing drive or in an attempt to induce the employer to raise wages or to improve working conditions in the same plant. The same would probably be true even if the picket

Montag Bros. Inc. (C. A. 5, 1944) 140 F. 2d 730, where the court held that employees were privileged by Section 7 in respecting a picket line established in an effort to organize their own plant. Respect for a picket line in such circumstances does of course amount to exercise of the right of self organization, and also participation in concerted action for mutual aid and protection.

But the Petitioner is contending in this case that the right to refuse to cross a picket line at any time, at any place, and under any circumstances is an *absolute* right, absolutely privileged against, and absolutely immune to any kind of discipline by employers.

We need hardly labor to this Court the point that the absolute right is an extremely rare specimen. As recently as 1951 this Court said that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. . . ." *Lorain Journal Company* v. *U. S.*, 96 Law. Ed. 121, 128 (1951). And again, in a much closer case, involving the rights estab-

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line were maintained by 'outsiders'—that is, a union representing no existing employees.

"Again, if the employer was dealing with a union which he illegally dominated or supported, he could probably not [lawfully] discharge or discipline employees who respected a picket line set up in rebellion against the existing representatives.

"Nor, certainly, could the employer discipline employees if he had refused to bargain with their representatives, and if the picket line were set up and respected as a consequence thereof.

"Finally, there can be no doubt that employees would be completely privileged to respect a picket line set up by their representative in a bargaining impasse. This fact indicates the narrowness of the [Seventh Circuit] court's decision and of the benefits which it confers on employers, for this is of course the most common case. If the employer gains from the decision no advantage in the most common case, it is clear the decision can be neither hailed nor damned as a great victory for employers." Petro, *Ibid.* at page 87.

Compare the view of another law-review writer, who insists that *Illinois Bell* leaves "no protection at all" to employees who respect picket lines. 52 Col. L. Rev. 934, 936 (Nov. 1952).

lished in the National Labor Relations Act and in Section 7 itself: ". . . Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798 (1945).

Respondent agrees that its traditional right to use its own discretion in the selection and direction of its working force is qualified by the Act's prohibition against anti-union activities. But it insists that there are limitations to this qualification of traditional employer rights, limitations established by this Court in the very beginning, in *Jones & Laughlin*, 301 U. S. 1, 44-45 (1937):

> ". . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion."

The Board is actually seeking now to transform a narrowly limited Congressional qualification of traditional employer rights into a complete negation of those rights, while at the same time expanding a limited employee benefit into an absolute right. This is an impermissible exercise of legislative power.

The Court has more recently ruled that the scope of the rights granted by Section 7 is not to be determined by *the Board's* conceptions of labor policy, except where those conceptions are in full accord with the expressed intent of Congress. *Colgate-Palmolive-Peet Co.* v. *National Labor Rela-*

tions Board, 338 U. S. 355 (1949). In *Colgate* the Board had held that a discharge pursuant to a (then lawful) closed-shop agreement violated the Act because in the circumstances of the case it unduly impaired the right of self-organization, as that right was conceived by the Board. Holding that the Board's ruling, although merely an application of its long-standing *"Rutland Court"* doctrine, could not be allowed to cancel the plainly-expressed Congressional sanction of the closed shop, this Court said:

> "Congress knew that a closed shop would interfere with freedom of employees to organize in another union and would, if used, lead inevitably to discrimination in tenure of employment. Nevertheless, with full realization that there was a limitation by the proviso of Sec. 8 (3) upon the freedom of Sec. 7, Congress inserted the proviso of Sec. 8 (3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." (*Ibid.* at p. 363.)

In *Colgate*, the Court observed that the employer had "no record of anti-union or anti-organizational activities" (p. 357), an observation which applies as well in this case. Again, in *Colgate* the Court observed that the contract on which the discharge was based "was entered into in good faith by the parties and served as a foundation for amicable labor relations for over four years" (*Id.* at 358). Respond-

ent here has contracted with Waugh's union for more than forty years, and the discharge of Waugh was based on rights granted the employer by the then current collective agreement (see Point IV, *infra*). In *Colgate* employees were discharged pursuant to a closed shop agreement because their union had suspended or expelled them for setting up a rival organization—plainly an exercise of the right to self-organization within the literal meaning of Section 7. Here an employee was discharged, pursuant to provisions of a collective agreement expressly prohibiting interruptions of work and defiance of employer instructions, because he had refused to perform those parts of his duties which required crossing the picket line of an unrelated union—not nearly so plainly, in the circumstances of this case, an exercise of a Section 7 right. The Court in *Colgate* referred to the closed shop as "one of the oldest techniques in the art of collective bargaining" (p. 362). But it has even more recently said that "bargaining for management functions clauses is common bargaining practice." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 96 L. Ed. 723, 728 (1952). In *Colgate*, the discharge was held justified on the basis of Congress's express sanction of closed-shop agreements. But Congress has also expressly declared that a discharge for "cause" is lawful (Section 10(c) discussed in Points III and IV, *infra*), and there can be no doubt that employer rights are equal in traditional significance to the closed shop. Indeed, the existing Congressional ban on the closed shop suggests that in the eyes of Congress the traditional rights of employer are of more social significance than the closed shop.

Colgate does not bind the Court to rejection of the Petitioner's position here, but its whole weight is thrust in that direction.

Respondent in this case is not even *charged* with having intimidated or coerced Waugh "with respect to self-organization and representation," to use the key words in the quotation from *Jones & Laughlin, supra.* Therefore, in holding the discharge an unfair practice, the Board has ruled in effect and now contends that conduct such as Waugh's is *absolutely* privileged. The Board apparently operates on the theory, at times, that every kind of lawful assistance extended among union members, regardless of the nature of the assistance or the circumstances involved, constitutes concerted action for mutual aid and protection within Section 7. For example, it has recently held that a consumer boycott (one of the activities made immune to injunctive relief by Section 4 of the Norris-La Guardia Act) is in all circumstances a Section 7 activity. *Hoover & Co.,* 90 NLRB 1614 (1950). In reviewing that holding, however, the Court of Appeals for the Sixth Circuit reversed the Board, criticizing its extreme conception of the scope of Section 7. 191 F. 2d 380. Previously a legal scholar who can scarcely be described as unsympathetic with the Board characterized the conception of Section 7 advanced by the Board in *Hoover* as unthinkable. *Cox, The Right to Engage in Concerted Activities,* 26 Ind. L. J. 319, 338, 346 (1951).

We of course do not contend that an individual refusal to cross a picket line is positively unlawful; the proviso to Section 8 (b) (4) of the Act clearly states the contrary (*infra,* pp. 62-63). We aver merely that a refusal *of the kind involved in this case* may not properly be viewed as a concerted activity for "mutual aid and protection" within the meaning of Section 7; that Waugh's individual action was based on personal interest and conviction having no bearing on "self-organization and representation" (*Jones & Laughlin, supra*); and that such action, expressing indi-

vidual sentiment, is no more entitled to the status of "concerted activity for mutual aid and protection" than was the venting of individual spleen in the *Joanna Cotton Mills* case, *supra*. However understandable Waugh's reluctance to be called a "scab" may be, it did not make his conduct "concerted action for mutual aid and protection." The Board's attempt to bring Waugh's conduct within the scope of Section 7 is an attempt to make every refusal to cross a picket line the exercise of an absolute right, not only absolutely lawful, but also absolutely immune to the exercise of the lawful right of employers to discipline or discharge employees for other than anti-union reasons.[5a]

This pushes a reasonable and desirable right too far. There are dangers as well as positive values in the concept of "labor solidarity". Not only all workers, in fact all members of society, have substantial mutual interests. It is as true in law as it is in life itself that no man is an island unto himself, that all are part of the main. Indeed, the profound significance of this concept provides the indispensable element in preserving to employers some reasonable scope for the orderly and efficient conduct of the nation's industry, in which every member of the nation has so immediate and direct an interest. So Congress must have felt in expressly preserving the right of employers to discharge for "cause". (Points III and IV, *infra*.)

[5a] The Board contends that Waugh's action is privileged because it gave *some* assistance to the Typographical Union and that it is not for the Board or the Courts to determine the degree of assistance which employees, in the exercise of their own discretion, determine to give. (Board's brief, pp. 23-24.) At the same time, the Board assumes that it has the power to limit the discretion of employers who have decided that discharge is the suitable discipline for an employee whose persistent insubordination materially embarrasses important business operations. *(Ibid.;* p. 46 *et seq.)* There is no justification in the Act or in the national policy for this ranking of employer and employee discretion. Furthermore, as we show in Point IIB3, *infra*, the Board's attempt to compel treatment of Waugh as an economic striker will not bear analysis for other reasons.

With picket lines a common phenomenon in American life, with American industry as integrated as it is, and with unionization so extensive and even, in some areas, universal as it is, the lack of wisdom in holding every refusal to cross a picket line an absolutely protected activity becomes apparent. Every strike in heavily unionized areas such as New York, the scene of this case, might become in more or less degree a general strike.[6]

Reversal of the Second Circuit in this case would undoubtedly encourage a trend toward widening the effects of labor disputes; knowledge that this Court has ruled employers powerless to defend themselves against refusals to cross picket lines will undoubtedly strengthen an already partly institutionalized practice;[6a] and thus the practice, with its undesirable social product, will spread. On the other hand, affirmance of the decision below will in no sense impair the rights which Congress was so plainly intent upon establishing in Section 7—the rights of self-organization, to collective bargaining, and to take other concerted activity for mutual aid and protection. No man's right to join a union, to participate in collective bargaining, or to take concerted action for mutual aid and protection, properly conceived, will be impaired by a holding that Waugh's conduct did not involve Section 7 activity at all. Indeed, union workers themselves may be thankful for having been substantially relieved of the implicit obligation to respect

[6] The dangers were evident to the far-seeing New York Court of Appeals as early as 1919. While pioneering in the struggle for establishment of basic labor rights, see *Bossert* v. *Dhuy*, 221 N. Y. 342 (1917), that court held sympathy strike action unlawful and enjoinable. *Auburn Draying Co.* v. *Wardell*, 227 N. Y. 1 (1919).

[6a] The New York *Times* of January 1, 1953, reports a threatened strike by certain longshoremen (scalers, dock weighers, and sugar samplers) which will immobilize the ports of New York, Boston, Philadelphia, and Baltimore. "Since the entire membership of the locals involved is only 600, the group would be unable to place more than one or two pickets at any pier." (*Id.*, p. 1.)

the picket lines of unrelated unions in whose objectives they have no real interest.

The words which Congress used in Section 7 do not naturally and straightforwardly yield to a construction which would make every refusal to cross a picket line a Section 7 activity; certainly they do not *necessitate* such a construction. This Court should not permit the Board to add to the Act concepts, rights, and doctrinaire extremes which Congress did not itself advance, and which are denied by the uniform course of authoritative construction.

However, even if this Court should conclude that it is possible and desirable to view a refusal such as Waugh's literally as a concerted activity for mutual aid and protection, as the Court below assumed *arguendo*, there is abundant authority and cogent reasoning in support of the proposition that the conduct *sub judice* is not the type of concerted activity which is entitled to the protection of Sections 7 and 8 (a)(1) against employer discipline exercised in the interests of normal, reasonable business operations.

II.

An employer does not violate Section 8(a)(1) where for lawful business reasons he discharges an employee who refuses to perform normal duties which would involve the crossing of a picket line of an unrelated union, since a refusal to cross such a picket line is not a concerted activity protected by the Act.

Summary.

The Board is accustomed to stating the issue in this case as if it were simply whether or not a refusal to cross a picket line is a concerted activity for mutual aid and pro-

tection within the meaning of Section 7. Sometimes it has stated the question as if it were, whether an employer violates the Act in discharging an employee *for* refusing to cross a picket line. (Petitioner's brief, Question Presented, p. 20.) Neither formulation grossly misrepresents the case. Yet both are subtle, if unintentional, distortions of the true underlying issue posed by the case. Speaking precisely, one cannot say, as the Board has continually said, that Respondent discharged Waugh *for* refusing to cross a picket line. To be accurate, Respondent discharged Waugh because Waugh chose not to perform all the duties which he implicitly and his union explicitly had agreed that he would perform as a condition of receiving the wages set forth in the collective agreement. Thus brought into better focus, the basic problem is whether Waugh's refusal to abide by the terms of his employment arrangement was specially privileged. And, assuming *arguendo* that Waugh's refusal to cross the picket line may accurately be viewed as a concerted activity within the *literal* meaning of Section 7, the issue narrowly stated becomes: is such a refusal the kind of concerted activity which the Court should hold always immune to employer discipline, even where such discipline is exerted solely in pursuance of normal business operations and in accordance with the conception, mutually held by the parties involved, of the employer-employee relationship?

One phase of the history of societies may be described in terms of the quest for methods of regulating in the general interest the techniques of action available to persons or groups acting in pursuit of their own immediate interests. Some nations have sought to minimize the harmful capacity of private groups or individuals by virtually destroying private power, by vesting all or nearly all power in government. Others, for a time at any rate, have relied

upon laisser faire. This country has chosen a more complicated way. In this country, two of the classic methods of control have been governmental regulation and private checks and balances. In the field of industry and commerce we have a comprehensive system of regulation; but we rely heavily at the same time on the powerful pressures of private competition to prevent social abuses by the business community. In labor relations likewise we have a scheme of legal control of employer and union conduct; but there too we rely heavily for moderation of the excesses of worker, union, and employer upon the checks and balances which the position and natural instincts of each impose upon the others.

The extent to which workers and their unions are to be permitted to take action in their own interest has posed one of the most enduring problems in labor law. This country's approach has been to establish three categories for concerted employee action: (1) a category of absolutely unlawful acts; (2) a category of absolutely privileged acts; and (3) a category of acts which, neither absolutely privileged nor absolutely outlawed, are left for approval or disapproval to the free play of economic and social forces. A refusal to cross a picket line of an unrelated union—the activity in issue in this case—falls into the third category. It is neither unlawful nor absolutely privileged. The person who engages in it does so at his own risk.

A refusal to cross a picket line—*in the circumstances of this case*—falls into the third category, and not into the second, because it is identical to those classes of employee activity which Congress characterized as "improper". Calling an activity "improper" was Congress's method of identifying employee activity to which it intended to deny the protection of Section 7 and Section 8(a)(1) without

declaring it positively unlawful. It was the method by which Congress distinguished between activities which belong in the first and second categories mentioned above, and activities which belong in the third category. This Court, the Courts of Appeals, and the Board itself have all operated consistently within the framework of those categories. In fact, two Courts of Appeals have already ruled that the activity in issue in this case falls naturally within the third category, while this Court and the Board have expressed themselves, in analogous cases, in a manner which places Waugh's conduct in that category—the category of activities not entitled to absolute immunity. Accordingly, when the employer discharged Waugh, for lawful reasons associated not at all with anti-union considerations, the discharge could not be characterized as interference with or restraint or coercion of the exercise of a right absolutely protected by Section 7.

A. The protection of Section 7 does not extend to either unlawful or improper activities, but is confined to straightforward organizational and strike action.

1. Construction of Section 7 Prior to Amendment of the Act in 1947.

Ever since this Court overruled the Board in the famous *Fansteel* case it has been established that not every activity literally described by the words "concerted action for mutual aid and protection" is protected by the Act against employer discharge or other discipline. (*N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939)). The *Fansteel* case involved a plainly unlawful act on the part of the employees who were discharged, i.e., a sitdown strike. The decision was a seminal one, however. On the basis of *Fansteel*, this Court, the Courts of Appeals, and the Board

itself in cases decided under the original National Labor Relations Act, fashioned the principle that Section 7 affords no protection, not only to unlawful acts, but to activities inconsistent with national labor policies and to other improper activities. Thus, in *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1942), this Court, again reversing the Board, held that a strike amounting to the crime of mutiny was not a protected concerted activity and admonished the Board that it was not to forget that its view of the national labor policy had to be integrated with other important national policies, not allowed to engulf them. In *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939), this Court found it necessary still again to restrain the Board's ardent efforts to inflate the meaning of Section 7 to the point where all other laws and all other social policies would exist only by sufferance. There the Court ruled that a strike in repudiation of a collective agreement was not a concerted activity entitled to the protection of Section 7. In so ruling the Court made a statement which is of extreme significance for the present case. It said: "* * * the Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (*Id.* at p. 344.) Waugh's refusal to enter the *Star* plant was a clear violation of the terms of his implicit contract of employment as well as of the collective agreement executed and signed by Waugh's union and the Respondent. In *Sands, supra,* this Court rejected the argument that a strike, being necessarily a concerted action for mutual aid and protection, privileged the repudiation of the agreement. It is difficult to see how a refusal to cross a picket line, in the circumstances of this case, can be held to privilege a similar repudiation. Certainly such a refusal is less clearly

a "concerted action" than a strike is, and therefore less entitled to the protection of Section 7.

But the line of authority begun in *Fansteel* did not end with the denial of Section 7's protection to the foregoing types of activities alone. While still operating under the Wagner Act, the courts and the Board significantly extended *Fansteel's* theory to employee activities which were scarcely unlawful in the normal sense. In *NLRB* v. *G. G. Conn, Ltd.* (C. A. 7, 1939) 108 F. 2d 390, the court held that an employer did not violate the Act in discharging a group of workers who had decided to work only according to their own conception of proper hours, refusing to work in accordance with the employer's instructions. Where another group of employees decided, contrary to their employer's instructions, to refuse to work upon goods routed to them from one of the employer's strike-bound plants, while continuing to do other parts of their work and drawing their regular pay, the employer was again held to have violated no part of the Act in discharging them after giving them the choice —as Respondent gave Waugh his choice in the present case—either to perform all work assigned or be dropped from employment. *NLRB* v. *Montgomery Ward & Co.*, (C. A. 8, 1946) 157 F. 2d 486. The decision by the Fourth Circuit in *Home Beneficial Life Insurance Co.* v. *NLRB*, 159 F. 2d 280 (1947), is an extremely significant one in the present connection. There, during a strike by a majority of employer's insurance salesmen, a minority continued to perform certain parts of their regular duties, but refused to report to work in accordance with the employer's instructions. The employer discharged the minority for refusal to comply with all instructions. This discharge, the Board held, was an unfair practice. The minority were engaged in a concerted activity protected by the Act—a partial strike

—according to the Board. But the Fourth Circuit reversed, referring to the Board's conclusions as follows:

> "It seems clear to us that these conclusions cannot be sustained. Insofar as they deny the right of the company to discharge for concerted disobedience to its rule, they are in conflict with established doctrine, as we have shown. . . . The men who did not strike on October 13, but continued to work without reporting in the morning as required by the rule were discharged and ceased to be employees on that date. Although they subsequently associated themselves with the strikers, they did not thereby improve their position or gain the right of strikers to reinstatement." (*Ibid.* at p. 286)

It would scarcely seem possible to get a case closer to the present one than *Home Beneficial* or *Montgomery Ward,* although *Sands* and *Conn, supra,* seem also very much in point.

Shortly before the National Labor Relations Act was amended by Congress, the Board itself began to hold that some genuinely concerted activities for mutual aid and protection are not privileged by Section 7 against employer discipline. So, in *American News Co., Inc.,* 55 NLRB 1302 (1944) the Board held that a strike to compel an increase in wages before approval thereof by the Wage Stabilization Board was an unprotected concerted activity. Again, in *Thompson Products, Inc.*; 72 NLRB 886 (1947), the Board held that a strike for recognition by one union at a time when another union had been certified as exclusive bargaining representative was an unprotected concerted activity. Meanwhile, in a closely related series of cases, various courts of appeals had been holding that minority or "wildcat" strikes were, with some exceptions, usually unprotected concerted activities. See, for examples, *N. L. R. B.*

v. *Brashear Freight Lines, Inc.*, (C. A. 8, 1941) 119 F. 2d 379; *N. L. R. B.* v. *Draper Corp.*, (C. A. 4, 1944) 145 F. 2d 199; *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, (C. A. 4, 1942) 127 F. 2d 109; *N. L. R. B.* v. *Indiana Desk Co.*, (C. A. 7, 1945) 149 F. 2d 987; *Western Cartridge Co.* v. *N. L. R. B.*, (C. A. 7, 1943) 139 F. 2d 855.

Before the National Labor Relations Act was amended in 1947 the Board also held that a strike in violation of a no-strike agreement, while not positively unlawful, was nevertheless an unprotected activity. *Scullin Steel Co.*, 65 NLRB 1294 (1946).

Such, in brief, was the status of authority concerning the scope of protection afforded by Section 7 when the Congress reconsidered the National Labor Relations Act in 1947.

2. Congressional Intent in Regard to the Scope of Protection Afforded by Section 7 of the Amended Act.

The Board has pointed out (petitioner's brief pp. 43-45) that when Congress in 1947 added to Section 7 a guarantee to employees of the right to *refuse* to engage in concerted activities, the additional guarantee was intended to protect against union coercion individual employees who chose to go to work even when that might involve crossing a picket line. As to that, no one familiar with the background of the Taft-Hartley Act can possibly disagree. But then the Board goes on to argue that this grant of protection *proves* that Congress intended to extend equal protection to the right "to respect a picket line." "Manifestly," the Board says, "the right to cross a picket line is protected only if it is the converse of an already protected affirmative right, *i.e.*, to respect a picket line." (Petitioner's brief p. 15; *cf.*, *ibid.* at p. 43.)

This is again an example of the Board's tendency to extreme over-simplification, and of its failure to deal adequately with the statute of which it is the primary guardian and administrator.

Congress definitely intended to protect against union restraint or coercion workers who decide to abstain from strikes or who decide to cross picket lines. That is the only conclusion which can be drawn from Section 8(b)(1)(A), which provides that it shall be an unfair practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ." What the Board has neglected to point out to this Court, however, is the fact that Section 8(b)(1)(A) goes on to provide "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." And the Board has also neglected to inform the Court of its holdings in the cases involving the Typographer's Union, *American Newspaper Publisher's Association* v. *N.L.R.B.* (C. A. 7, 1951) 193 F. 2d 782 enf'g 86 N.L.R.B. 951, 86 N.L.R.B. 1041, and 87 N.L.R.B. 1418. In those cases the Board held that the union did not violate the Act in threatening with expulsion a member who demurred to participation in the unlawful activities of the union.

The significance of these omissions by the Board lies in the fact that the speciousness of its logic is hidden so long as the neglected statutory provision and cases are left unmentioned. The fact which the neglected provision and cases make plain is that Congress did not mean to render entirely immune to union discipline a refusal to participate in picketing activity, any more than it meant to make entirely immune to employer discipline the converse respecting of a picket line. A union man may decide to cross his own union's picket line, and be entitled to relief at

common law and under the Act if his union should inflict physical harm upon him for such conduct; but he is entitled to no relief under the plain words of the statute and under the Board's interpretation of those words if the union expels him from membership for refusing to participate in the strike or the picketing.

Respondent does not, on the other hand, however appealing the reverse of the Board's logic may seem at first blush, assert that the considerations just sketched necessarily "prove" that Congress meant to permit an employer to impose discipline on the respecter of the picket line. For one thing, Respondent urges here, as it has urged before, that its right to discipline an employee for refusing to cross a picket line varies with the circumstances, that the previously cited analysis sketching situations in which such discipline would violate the Act, is entirely sound. In the second place, and more important, it seems plain that Congress did not intend, in granting the right to *refuse* to engage in concerted activities, to restrict or in any way to affect the employer's scope of action in disciplining employees who engage in concerted activities.

One of the clearest expressions of Congressional intent in regard to the 1947 amendments of the Act, in fact, is the one relating to Section 7, to be found in *House Conference Report* No. 510 on H. R. 3020, 80th Cong. 1st Sess. 38-40. An extensive excerpt from this Report is reproduced in the Appendix to this brief (p. i).

It must be remembered here that as of 1947 the courts and the Board had developed the theory that *true concerted activity* was unprotected by the Act, not only where the activity was unlawful in itself (*Fansteel, supra; Southern Steamship, supra*), but also where it was "improper" in the sense of repudiation of either a collective agreement (*Sands, supra*) or the implicit terms of employment (*Conn.*

Montgomery-Ward, Home-Beneficial Life Insurance Co., supra). Furthermore the Board had at that time given promise of acquiescence in these judicial developments (*American News, Thompson Products, Scullin, supra*). Perusal of the Conference Report cited above will show that Congress was vividly aware of these developments. Yet, in spite of this complete awareness, Congress chose not to make any change in the wording of Section 7 which would increase the scope of protection afforded employees against employer discipline. In these circumstances it seems perfectly plain that Congress did not disapprove of the developing circumscription of protected action herein noted. But there is no necessity of relying upon inference here as to Congressional intent. The drafters of the Report expressly said that they approved of the developments in the Courts and the Board. Much more than that, the drafters went on to say that they declined to embody their approval in the written words of the statute only because they feared that to do so might inhibit the trend toward developing the area of unprotected action:

> "... there was real concern that the inclusion of ... a provision [excluding certain activities from the protection of Section 7] might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act" (Ibid. p. 39).

If Congress were satisfied with the extent to which protected concerted action had thus far been defined by the Courts, it would have been relatively easy for it either to list the forms of concerted action which had already been held unprotected, or, as it did in Section 13 of the Act, express approval of the then existing limitations which had been placed on Section 7. Instead it chose to leave the

relevant statutory language unchanged, while at the same time saying unmistakably in the Conference Report that the existing trend in the Board and the Courts had Congressional approval, and should be continued.

It is not surprising, in these circumstances, that the Courts have continued under the Taft-Hartley Act the trend begun under the Wagner Act of careful definition of the types of concerted action entitled to the positive and absolute protection of the National Labor Relations Act, as amended.

3. Construction of Section 7 since 1947.

Circumscription of the scope of protection afforded by Section 7 has proceeded on all levels since 1947. This Court, the Court of Appeals, and the Board itself, since 1947 have all handed down decisions adding to the pre-1947 list of unprotected concerted activities.

The most significant decision since 1947 bearing on the scope of Section 7, although not as close factually to the present case as some of the others, was the decision of this Court in the "Briggs-Stratton" case, *International Union, UAW-AF of L* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, petition for rehearing denied, 336 U. S. 970 (1949). The issue in that case was not whether an employer violated the Act in disciplining employees who had engaged in concerted activities. Instead, the question was whether Section 7's guarantee of the right to engage in concerted activities was infringed by a Wisconsin statute which had been construed by the Wisconsin courts as outlawing intermittent strike action, carried on a short part of each day for some twenty-six days. Clearly the strike action was concerted action for mutual aid and protection, within the *literal words* of Section 7. Nevertheless, a

majority of this Court held that it was not *protected* concerted activity. Therefore, the Court concluded, the Wisconsin statute did not run afoul of the Federal Act, and could stand.

The bare holding of *Briggs-Stratton* is in itself distinctly important in the present litigation, establishing as it does that Section 7 does not protect against state regulation a genuinely concerted activity which is lawful under the National Labor Relations Act. Holding that much, it must also hold that an employer may discharge "installment-plan" strikers without violating the Act even in states which, unlike Wisconsin, do not positively outlaw such eccentric strike action. It necessarily means that "partial" strikers are not protected by the Act against employer discharges or other forms of discipline. It cannot mean that an activity is unprotected so far as state regulation is concerned but protected so far as employer discipline is concerned. Nothing in the Act suggests such a double standard of measurement of the scope of Section 7's protection.

But the importance of *Briggs-Stratton* to the present litigation does not stop there. The majority opinion goes on to propose, for the first time, a generalization concerning the meaning and scope of Section 7—a generalization which can go far toward resolving and clarifying the vexing problems which have studded its history. The Court said, in *Briggs-Stratton*:

> "In the light of labor movement history, the purpose of . . . [Section 7] becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 . . . took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state,

as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." (*Id.*, pp. 257-8.)

This Court is thus committed to a view of Section 7 at odds with that of the Petitioner. Whereas the Board would hold, if some of its decisions and its arguments here are to be credited, that virtually every activity engaged in by a union man or union men in connection with "traditional union action" affords protection against the imposition of discipline for violation of normal working rules, this Court has declared that while Section 7 provides a staunch bulwark against reversion to "criminal conspiracy" days, it does not give unions and their members a general privilege to subordinate to their own ends and interests the public interest in efficient conduct of business. This view of the Court seems so relevant in the present case that we cannot but specifically commend it to the Court's attention here. The *Briggs-Stratton* case establishes clean-cut organizational techniques and straightforward, lawful strike action as beyond the reach of the employer's discipline or of state prohibition. At the same time it establishes that not all activities by working men or their unions are protected concerted activities merely because they occur in the context of the employer-employee relationship. Put another way, *Briggs-Stratton* affirms immunity for the lawful activities centrally essential to the union movement—the rights to organize, to bargain collectively, and to withhold services in concert for purposes of mutual aid and protection; but it denies positive protection to peripheral, non-essential activities, however "tradi-

tional" in the labor movement they may be. And where it is doubtful that the activity in question is basically concerned at all with collective action or mutual aid and protection—as is the case in regard to Waugh's refusal to cross the Typographers' picket line—it seems clear that the theory of *Briggs-Stratton* requires denial of the protection of Section 7.

Other significant cases in point decided since 1947 come much closer factually to the instant case. In an almost identical case, the Seventh Circuit has held that a refusal to cross a picket line is either not a concerted activity at all or at any rate not a protected concerted activity. *NLRB* v. *Illinois Bell Telephone Company,* 189 F. 2d 124, cert. den. 342 U. S. 885 (1951). With the latter conclusion the Court below in the present case agreed. Meanwhile the Board itself has very recently handed down decisions which reveal it far more in agreement with Respondent than its presence and argument here would suggest. In these decisions, which we shall consider in detail in the next point of this brief (IIB.5), the Board has held that a slowdown is an "indefensible" and therefore an unprotected concerted activity (*Elk Lumber Company,* 91 N. L. R. B. 333), so indefensible, in fact, that an employer may not only discharge participants therein but even refuse to bargain with the responsible union during the period of the slowdown (*Phelps Dodge Copper Products Corp.,* 101 N. L. R. B. No. 103; (November, 1952)), and that an employer may discharge an employee who—as a union official—persisted in prosecuting employee grievances in violation of shop rules promulgated by the employer. *Crucible Steel Castings Co.,* 101 N. L. R. B. 105 (November, 1952).

The authorities which have been discussed to this point make it clear:

1. That despite the generality of its language, Section 7 does not absolutely privilege even all activities which are genuinely concerted and genuinely for mutual aid and protection;

2. That activities may fall short of the protection of Section 7 even though they are perfectly lawful in and of themselves;

3. That Congress intended to deny and that this Court, other Courts, and the Board itself have acquiesced in the denial of the protection of Section 7 to "improper" concerted activities;

4. That the protection of Section 7 may reasonably and practicably be restricted to the basic rights of self-organization, collective bargaining, and straightforward lawful strike action for genuinely mutual aid and protection.

B. Such a refusal to cross a picket line as is involved in this case, while not in itself unlawful, falls naturally within the category of unprotected concerted activity.

The Court below, Clark, J. dissenting, held that Waugh's refusal to cross the Typographers' picket line was not the type of conduct which Section 7 protects against employer discipline, where such discipline is imposed, not for anti-union purposes, but for strictly business reasons. In so holding, the Court relied mainly on such cases as *Conn* and *Montgomery Ward, supra,* which hold that unilateral dictation of employment terms and conditions by employees is not immune to employer reprisal even though the dictation is expressed in the form of conduct which may be described

literally as "concerted action." The Court relied to some extent also on a line of cases, culminating in this Court's decision in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1944), which established that an employer may limit the exercise of the right of self-organization on company premises, except in extraordinary circumstances, to non-working time. The Court below reasoned that since the right of self-organization and the right to take concerted action are stated as equal and coordinate rights in Section 7 they are subject to substantially similar qualification. Hence, the Court ruled, Waugh's right to take concerted action should protect his refusal to cross a picket line only where exercised on his own time, not at the expense of his employer. Judge Clark dissented largely on the basis of his conclusion that since Congress had expressly disavowed any intent to make an individual refusal to cross a picket line positively unlawful, it must have intended to make it unlawful for an employer in any circumstances to discipline an employee who respected a picket line.

Petitioner challenges each step in the reasoning of the court below, asserts that the holding below conflicts in principle with decisions of this Court, and urges the soundness of the conclusion as well as the reasoning of the dissenting judge.

1. The decision of the court below does not conflict, "in principle" or otherwise, with decisions of this Court.

The sole support cited for Petitioner's contention that the decision below "conflicts in principle with decisions of this Court" (petition, p. 11) is a statement by this Court in *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675, 687 (1950). As edited by the Petitioner (petition, *ibid.*), this statement both expresses recognition by the

Court that pickets seek "to influence . . . employees of [customers] of the [picketed employer] not to cross the picket line", and declares that "such conduct [by the pickets] was no more than was traditional and permissible in a primary strike". But it is impossible to see how the decision of the Court below conflicts in principle with the foregoing expression in the *Denver* case. The Court below has not said that the *Typographers* committed an unfair practice, or even that they engaged in an unprotected concerted activity; and it was the union in the position of the *Typographers* to which the Court had reference in the language quoted above from the *Denver* case, when it said that primary picketing is traditional and permissible. In its effort to create a conflict between this Court and the court below, the Board has engaged in an unjustified extension of this Court's meaning. The Board has attributed to this Court the untenable contention that since unions do not always commit an *unlawful* act when they set up the typical peaceful picket line, it must follow that employees who respect such a picket line are engaging in an *absolutely privileged* act.

The Board apparently reasons that since both primary picketing and respect for picket lines are traditional in the labor movement, the latter must be comprehensively privileged if the former is lawful.

Given a moment's reflection, this proposition and the reasoning behind it seem to have little more than assertion to commend them. The Board is actually saying that since Congress did not make it unlawful for unions to picket, it must have intended every picket line to be completely effective; and since the effectiveness of picket lines is diminished where other workers are not completely immune to discipline by their employers, Congress must have intended

to grant such immunity. But this is a roundabout way for Congress to work. If it were so preoccupied with insuring the success of every strike and picket line, it would have been much simpler and more effective to have granted immunity directly to the strikers and picketers, to have given the strikers and picketers the job security and the subsidy that the Board now seeks for some of those to whom picket lines are addressed. But this Court has held that Congress did not so intend to subsidize strikers; economic strikers take a real risk of losing their jobs. *N. L. R. B.* v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333 (1937).

Again, if Congress were so single-mindedly concerned with insuring the success of strikes and picketing, why should it positively state, as it did in Section 7, that employees have a right to refuse to engage in concerted activities? The Board says in its petition (p. 12): "We submit that the legislative history does not sustain a congressional purpose to protect primary picketing and yet in effect to destroy its potency by withholding protection from employees who heed its appeal." Respondent's observation here is that a good deal may be learned about Congressional intent on the point in issue by reading the statute itself, especially in the light of the existing precedents in 1947.

Finally, in its attempt to fabricate a conflict between the court below and this Court, Petitioner reveals its basic lack of understanding of the attitude of this Court toward such "traditional primary action" as peaceful picketing. In 1950 the Court handed down three decisions which held in sum that the states are free to prohibit peaceful primary picketing where the objectives of such picketing conflict with important state policy. *Hughes* v. *Superior Court of California*, 339 U. S. 460 (1949); *International Brotherhood*

of Teamsters v. *Hanke*, 339 U. S. 470 (1949); *Building Service Employees* v. *Gazzam*, 339 U. S. 533 (1949). Petitioner's view is that if Congress has failed to outlaw "traditional primary picketing" it must necessarily follow that respect for such picketing is absolutely immune to employer discipline. In its brief (p. 39), Petitioner makes the startling statement that "to hold that employees who refuse to cross primary picket lines are not protected is to hold that permitting inducement has precisely the same effect as prohibiting it." It must amaze Petitioner to discover that this Court has held the states free to prohibit the inducement itself, notwithstanding the failure of Congress to do so.

Under the type of logic repeatedly utilized by the Petitioner, a Congressional refusal to prohibit a certain species of conduct necessarily involves a Congressional intention absolutely to immunize and to encourage that conduct and all related conduct. Thus the will of Congress is frustrated, according to Petitioner, each time a person fails to perform an act which Congress has not outlawed; and indeed it becomes positively unlawful for a person to take any action, however lawful in itself, which discourages conduct in others that Congress has failed to prohibit. To state such propositions is to refute them.

2. The Court below Correctly Correlated the Right to Engage in Concerted Activities and the Right to Self-organization.

Petitioner attacks the correlation by the court below of the right to refuse to cross a picket line with the right to engage in organizing activities, with both being limited to the free time of the employee involved. According to Petitioner, the court below "misconstrued and misapplied the decision of this Court in *Republic Aviation Corporation* v. *N. L. R. B.*, 324 U. S. 793," in making this correlation

(Petition p. 15; Brief, p. 47). We shall soon see who has "misconstrued and misapplied" *Republic Aviation.*

Petitioner contends that the correlation made by the court below is in error because exercise of the right of self-organization retains reasonable scope even though limited to nonworking time, while "the right" to refuse to cross a picket line is virtually meaningless if restricted, as the court below would restrict it, to exercise only during free time. The clear thrust of this contention is that if in *Republic Aviation* this Court had felt that exercise of the right of self-organization were "unduly impaired" by restricting solicitation of union membership on company premises to nonworking time, it would have held that employees have an absolutely protected right to engage in organizing activities during working time. More than that, Petitioner's position on this point implies that the choice before this Court *in Republic Aviation* lay between permitting solicitation during working hours and restricting it to nonworking hours, always on company premises. Of course nothing could be further from the truth. The central issue in *Republic Aviation* was whether an employer need permit *any* organizational activity on company premises; there was no question of his right to prohibit solicitation during working hours. And it is absurd to insinuate, as Petitioner has, that this Court would have required an employer to permit organizational activity during working time had it thought that a restriction to nonworking hours would "unduly impair" the efficacy of organizational activity.

Exposed to these considerations, the Board's attack on the correlation made by the court below expires; and the correlation emerges as a sound and sensible application of *Republic Aviation.* Restricting the protection of Section 7

to respect for picket lines in the circumstances of this case only during the free time of employees certainly will have a tendency to hamper the effectiveness of some picketing. But it is impossible to assert seriously that the limitation of organizational activity to non-working time does not have a similar tendency.

The Board's error lies in the assumption that no feature of the Act must ever be construed disadvantageously to the labor movement, regardless of whatever other valuable social interests may be trampled in the process. Cf. *N. L. R. B.* v. *American National Insurance Co.*, 343 U. S. 395 (1952). The fact is that an employer has never been required in the name of Section 7 to subordinate essential features of the productive process to the right of employees to take concerted action. The Board merely errs in citing the strike as an example of that kind (Petition p. 16; brief pp. 51 *et seq.*). No employer to date has been ordered to pay workers for the time they have spent on strike. Even in the case of unfair labor practice strikers, who have been held to be unconditionally entitled to reinstatement, the rule is that they do not receive back pay for the period of the strike. For a collection of cases in point, see *2 C. C. H. Lab. L. Rep. (4th Ed.)* Par. 4765.60, *et seq.* The fact that workers normally strike during working hours (Petition p. 16) is simply irrelevant to the present issue. If they strike and remain on the job, they are certainly not engaging in a protected concerted activity. *Fansteel, supra.* If they strike and leave the plant, it is improper to speak of their action as a violation of working rules, unless there is a no-strike agreement, in which case they are likewise not engaging in a protected concerted activity. *Sands, supra.*

3. The Court Below Correctly Distinguished Between "Partial" Strikes and Complete Strikes in Holding the Former Unprotected.

The Board's argument in support of the contention that the Court below erred in holding Waugh's action unprotected as a kind of "partial strike" (Petition, pp. 20-22; Brief, pp. 57 *et seq.*), while exceedingly difficult to unravel, seems to involve two main points: (1) that Waugh's conduct was in fact not a "partial strike" within the meaning of *Conn* and *Montgomery Ward, supra*; and (2) that "partial strikes" are entitled to the same status under the Act as complete (lawful) strikes. The whole line or argument is at odds with decisions of this Court and of the Courts of Appeals.

Waugh's refusal to cross a picket line is properly viewed as a partial strike. As the Court below put it, Waugh was attempting to remain at work, draw his full pay, and at the same time determine on a strictly unilateral basis, despite Respondent's firm position to the contrary, just which duties he should perform and which he should not. These are precisely the elements which in *Conn* and *Montgomery Ward* impelled the Courts to deny the protection of the Act. The Board ostensibly seeks to distinguish these cases on the ground that Waugh's objective was somehow more privileged than those of the employees involved in *Conn* and *Montgomery Ward*. Such is the burden of its accusation (Petition, p. 20; Brief, pp. 57 *et seq.*) to the effect that the holding below "is based upon a misconception of the objective which underlies employee refusals to cross picket lines." Actually Waugh's objective, or motivation, or sentiment was *identical* to the objective of the "partial strikers" in *Montgomery Ward*. The employees there, it will be remembered, refused to work on orders which had been routed to their plant from one of the employer's strike-bound plants; thus they, like Waugh, were manifesting "labor solidarity". In *Conn*,

the "partial strikers" took action in their own immediate interest, for their own immediate benefit; they refused to work more than the hours they chose to work. How the Board can seriously argue that Waugh's objective makes his action entitled to the protection of the Act, and at the same time disavow any intention to challenge the authority of *Conn* and *Montgomery Ward*, is impossible to understand; for Waugh's objective was far less concerned with "mutual aid and protection" than that of the employees in *Conn* or even *Montgomery Ward* (where their own employer was involved in the dispute). The truth is, of course, that Petitioner is asking this Court to reject both *Conn* and *Montgomery Ward*.

Much more than that, Petitioner is asking the Court to reverse its own decision in *Briggs-Stratton*, 336 U. S. 245, despite the fact that the Court refused to reconsider that decision when the Board asked for a rehearing shortly after it was handed down, 336 U. S. 970 (1949). The Board's challenge of *Briggs-Stratton* is implicit in its insistence that "partial" strikers are entitled to the same treatment as complete strikers (Petition, p. 22; Brief, pp. 61 *et seq.*); it is implicit in its approving citation (*id.*) of the Third Circuit's *N.L.R.B.* v. *Kennametal*, 182 F. 2d 817 (1950), a case which holds that partial strikers are engaged in a protected concerted activity. This Court's decision in *Briggs-Stratton* will become anomalous if the Petitioner and the Third Circuit are now held correct in identifying partial strikes with complete, straightforward, lawful strikes. For *Briggs-Stratton* refused to invalidate a state statute which prohibits partial strikes. The statute in question makes it an unfair practice for employees "to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (Wisc. Stats. Sec. 111.06(2)(h)). The State

Supreme Court had held that a partial, intermittent strike, lasting an hour or two each day for twenty-six days, was unlawful under this provision. *Int'l Union UAWA, Local No. 232* v. *Wisconsin Board*, 250 Wis. 550, 27 N. W. 2d 875 (1947). Had it been this Court's view that a partial strike is a concerted activity protected by Section 7, it would have had to strike down the Wisconsin statute, as being in conflict with the National Labor Relations Act. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1950). This Court's refusal in *Briggs-Stratton* to strike down the Wisconsin statute can therefore be viewed only as a holding that a "partial strike" is not a concerted activity protected by Section 7. And Petitioner's present attempt to require equal treatment of partial and complete strikers can accordingly be viewed only as a repetition of its previous attempt to induce this Court to reverse itself in *Briggs-Stratton*.

Whether or not there is a distinction between discharging and replacing economic strikers, *cf. N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1937), is not a real issue in this case, as Petitioner seems to think it is (Petition, p. 18; brief, p. 51). Petitioner insists that Waugh be given the same rights that *Mackay* gives to complete economic strikers; it insists that Respondent violated the Act in *discharging* Waugh, although conceding that there would be no violation if Respondent had merely *replaced* him. But this is to miss the gist of the decision below, of Respondent's argument here, and of *Briggs-Stratton, Conn,* and *Montgomery Ward*. Waugh simply was not an economic striker; he was at the very most a "partial striker". And so the court below held. The Board's attempt to compel treatment of Waugh as an economic striker, besides

having no basis in reason or in the facts of the case, is a legislative attempt of the precise variety which this Court condemned in *Colgate* (*supra*, I. B, 2), a flat challenge of this Court's decision in *Briggs-Stratton*, and a submerged effort to secure the invalidation of the rule of *Conn* and *Montgomery Ward*. Those decisions hold that "partial strikers" are not entitled to the narrowly limited protection which the Act, as construed in *Mackay*, extends to persons who engage in a complete economic strike in a lawful manner and for a lawful objective.

Petitioner has gone to such great lengths in castigating the court below on the general problem of the status of economic strikers that it seems desirable, despite the plain difference between a partial striker and a complete economic striker, to go further into the matter. For the fact is that Petitioner has repeatedly misstated the law concerning the status of economic strikers. It has misstated not only the leading case on the subject, *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, *supra*, but its own decisions. The Board continually speaks of *Mackay* as establishing that economic strikers have an unqualified right to reinstatement to the jobs they vacated, if those jobs remain unfilled when the strikers decide to return to work. It says at one point, for example, that an economic striker "continues to be an 'employee' within the meaning of Section 2(3) of the Act, and is entitled to be reinstated if he has not been replaced." (Board's brief, p. 53.) Both the *Mackay* case and decisions of the Board itself are authority against that proposition. In *Mackay*, the Court stated with perfect clarity that an economic striker has only the same right to employment in the job he vacated as any original applicant for employment would have—that is, the right to have his application for re-employment considered on some basis

other than union membership or activity. At one point, the undivided Court in *Mackay* said:

> "* * * the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by Section 8." (*Id.*, p. 346.)

At another point in *Mackay* the Court said:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings." (*Id.*, at p. 347.)

This language makes it plain that the strikers in *Mackay* — all economic strikers — were not "entitled" to re-employment. They were entitled to have their applications for re-employment considered on a non-discriminatory basis. They were entitled to that and nothing more. Over vigorous dissent by certain Members, the National Labor Relations Board reached the same conclusion in respect of the right of economic strikers. It has held that economic strikers who have not been replaced are not automatically

entitled to reinstatement, but are entitled, instead, like any other "employee," only to have their applications for reinstatement accepted or rejected on some basis other than union considerations. *National Grinding Wheel*, 75 N. L. R. B. 905 (1948); *Container Mfg. Co.*, 75 N. L. R. B. 1082 (1948), enf. den. on other grounds (C. A. 7, 1949) 171 F. 2d 769. See also *N. L. R. B.* v. *Wiltse*, (C. A. 6, 1951) 188 F. 2d 917; *Oklahoma Rendering Co.*, 75 N. L. R. B. 1112 (1948); *Waterman Industries*, 91 N. L. R. B. 1041 (1950); *Old Line Life Ins. Co.*, 96 N. L. R. B. No. 66 (1951); *Colonial Shirt Corp.*, 96 N. L. R. B. No. 104 (1951).

These facts concerning the legal status of economic strikers show in another way the extremity of the Board's error in the present case. The Board continually insists that it is "reasonable" to give "partial strikers" such as Waugh the same status that economic strikers have under the law. When the status of economic strikers is properly understood, it becomes evident that it is impossible to make sense of the Board's proposal. It becomes evident, furthermore, that the Board is actually asking this Court to give "partial strikers" a more favored status than economic strikers have. The Board would hold that persons who respect picket lines are unqualifiedly entitled to reinstatement if their jobs are not filled, whereas, as has just been shown, in belated acquiescence in the rule plainly set forth in *Mackay*, it holds that genuine, economic strikers have a right only to a non-discriminatory basis of selection or rejection for employment.

Suppose that Waugh were accorded the same status that the law—properly understood—accords to economic strikers. He would have been compelled to leave his job entirely, on the ground that he had refused to perform part of his normal duties; on the ground, in other words, that

he had been insubordinate, or that he had violated the portion of the collective agreement which prohibits all interruptions of work (Part IV, *infra*). When he applied for re-employment, assuming he had not been replaced in the meantime, the employer would be free to consider the application for re-employment—free to accept or reject it—on any basis other than a desire to discriminate against Waugh for his union membership and activity. The problem would then be the same as it always has been in this case: did Waugh's refusal to cross a picket line provide a special privilege for his insubordination and his deliberate violation of the collective agreement?

The answer to this question is best found through following the gradual development of the concept of the "unprotected" concerted activity, the concept which this Court and the Courts of Appeals have consistently and patiently developed and which the Congress so plainly approved in 1947. For purposes of this case, the concept is appropriately applied in terms of the words "partial strike." The court below was riding in the main stream of legal development when it held that Waugh's insubordinate action was properly to be described as a partial strike or as a unilateral dictation of terms of employment, and therefore unprotected.

4. The Proviso to Section 8 (b) (4) Does Not Bear Materially on the Issue of This Case.

At various points in the Petition (pp. 17, 19, 23, 24) and in its Brief (pp. 35 *et seq.*), the Board refers to the proviso to Section 8(b)(4) as tending to establish a protected status for Waugh's conduct. The dissenting opinion below is based almost entirely on that proviso. The proviso in question reads as follows:

> ". . . nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any

person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Respondent wishes to offer two points concerning this proviso: first, that thorough analysis will reveal that it ultimately does not materially aid in the disposition of this case; and second, that on the whole such insights and inferences as are reasonably to be gained from the proviso militate against the position taken by the Board here and by the dissenting judge below.

The first of these points follows logically and reasonably upon careful attention to the function of the proviso. The operation of the proviso is internally limited expressly to Section 8(*b*) of the Act, the portion of the Act dealing with *union* unfair practices. The plain intent is to exculpate. Just *who* is exculpated is not quite clear; but be that as it may, the plain intent is to mitigate the burden of Section 8(b) in some manner. To say that the proviso is designed to mitigate the burden of 8(b) is to say that it is designed to make *not* unlawful some form of conduct which might, in the absence of the exculpation, be held to be in violation of the Act. With so much, scarcely anyone may reasonably differ. But the Board wishes to go much further. It wishes to establish that a Congressional disavowal of intent to make certain action *unlawful* amounts to the grant of an *absolute privilege* to engage in such action.

This, we respectfully submit, is cruel and unusual punishment of language, and of meaning. It overrides the manifest point that Congress did its privileging in Section 7. And it overlooks the plain distinction, to which we have already referred, between unlawful acts and absolutely

privileged acts. In our summary of Point II of this brief, we referred to the three categories of (1) absolutely unlawful acts, (2) absolutely privileged acts, and (3) acts which, neither absolutely privileged nor absolutely outlawed, are left for approval or disapproval to the free play of economic and social forces. The Board would now destroy the triple categorization by asserting that every act which is not outlawed must be absolutely privileged. But no citation of external authority is needed in order to rebuff this attempt. The Labor Management Relations Act itself demonstrates in a section to which the Board has not referred that Congress was aware of, approved of, and acted in accordance with this triple categorization.

The section just referred to is the "Saving Provision," Section 502 of the Labor Management Relations Act, which provides that:

> "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. . . ."

This saving provision was designed to allay fears that might be raised by the restrictions on strikes which the Act contains. It was designed to forestall constitutional challenge on "involuntary servitude" grounds. As put in *Senate Report No. 105* on S. 1126 (80th Cong. 1st Sess. p. 30), Section 502 makes it "clear that no provision of the act is to be construed as compelling an employee to render forced labor. . . ." Now, if the Board is correct in arguing that a deliberate refusal by Congress to provide for *legal action* is reasonably to be translated into an *absolute*

immunization, then it would seem to follow that an employer may never discharge *individual strikers*, since the effect of Section 502 is to make it impossible for any court to order individuals to work, even though they are participants in an unlawful strike. But Congress plainly intended no such result. As demonstrated by the excerpt from the House Conference Report reproduced in the Appendix (p. i), Congress assumed that employers had a privilege under the Act to discharge, not only unlawful strikers whom courts could not order to return to work, but even employees who had engaged in lawful, but unprotected, concerted activities. *Cf. Perry Norvell Co.*, 80 NLRB 225 (1948).

Thus, for the Board to say that, because the proviso operates to make a refusal to cross a picket line *not unlawful*, it also prohibits an employer's discharging of persons who refuse to cross a picket line, is simply to beg the question. The question in this case is not whether Waugh's action is made unlawful by Section 8 (b) of the Act. The question, putting it in the proper alternative, is either whether the *Respondent's* conduct is made unlawful by Section 8 (a) (1), or whether *Waugh's* conduct is *absolutely privileged* by Section 7. The proviso does not contribute substantially to either clarification or resolution of that issue.

Furthermore, what contribution the proviso does make is on balance against the Board. The Board argues that the proviso should be viewed as at least an indication of the high regard which Congress had for "traditional" union action. And on that basis the Board urges this Court to proceed to the conclusion that Congress intended in the proviso to immunize a refusal to cross a picket line against employer discipline, regardless of the motivation for the discipline. Careful attention to the language of

the proviso and to the formal explanation of that language in the Committee Reports persuasively suggests an exactly contrary conclusion. In the first place, the proviso does not exculpate *all* respect for picket lines. Instead, it excuses from illegality *only* the respecting of a picket line established by a *majority union*. Such is the impact of the concluding words of the proviso: "a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." Such a qualified exculpation means that in other circumstances—for example a strike not called by a majority union—a refusal might be, not only unprotected, but positively unlawful. Here again, however, it is not necessary to rely on rational inference alone. The draftsmen of the Act expressly said as much:

> "Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strike-breaking activities would not be deemed an unfair labor practice *unless the strike is a "wildcat" strike by a minority group.*" (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. p. 23. Italics supplied.)

This is as much as to say that Congress intended to *outlaw* a refusal to cross a picket line in certain circumstances. If Congress thought so little of the "traditional" respect for picket lines that it contemplated positive outlawry, it would seem impermissible to assert that Congress meant at the same time absolutely to privilege such conduct.

At the least, then, the proviso is irrelevant to the present case; the fact that Congress guardedly disavowed intent

to make certain conduct unlawful in certain circumstances is not persuasive ground for the inference that Congress meant absolutely to privilege that conduct in all circumstances. At the most, the proviso militates against the Petitioner's basic contention that this Court must give complete immunity to a refusal to cross a picket line because of its "traditional" character; for the proviso suggests, especially in the light of the Committee statement just quoted, as in fact do all of the subdivisions of Section 8(b), that Congress was no great admirer of traditional union action.

Petitioner's reference to the proviso obstructs rather than aids in the clarification and the resolution of the issue posed by this case. The basic issue is whether a refusal such as Waugh's belongs in the category of "protected concerted action" as that category is defined in the Act itself and in the Congressional statements, judicial opinions, and National Labor Relations Board decisions which have been presented. To that basic issue we now turn.

5. A Refusal to Cross a Picket Line in the Circumstances of this Case Falls Naturally within the Conception of Unprotected Action held by Congress, the Courts, and even the Board Itself.

Respondent does not contend that every refusal to cross a picket line is an unprotected concerted activity. Respondent urges, instead, only that a refusal in the precise circumstances of this case is unprotected. These circumstances, dealt with in part in Point I of this argument and to be dealt with further in Points III and IV, include (1) the essentially personal and solitary nature of Waugh's conduct; (2) the lack of any "common cause", in any proper sense, between Waugh and the union whose picket line he respected; (3) the entire absence of even an allega-

tion of anti-union motivation in Respondent's discharge of Waugh; (4) the presence of both an implicit and an explicit contractual basis for Respondent's discipline; and (5) the special problems of the newspaper industry, of which it is often said "today's newspaper wraps tomorrow's fish." The last circumstance is not cited in order to secure an exception in favor of the newspaper industry. It is advanced because of the aid it affords in characterizing Respondent's discharge of Waugh. With the time exigencies of the industry given due weight, a form of discipline which might in other circumstances be suspected as at bottom unlawfully motivated, may appear normal, reasonable and entirely justified. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1944). The time factor also heightens the significance of the key clauses in the collective agreement: the clauses prohibiting all interruptions of work, directing speedy adjustment of grievances, and requiring absolute obedience of the orders given by foremen (R. 26, 61). It goes far to clarify the importance to this case of Respondent's determined resistance to union pressures for inclusion in the agreement of a *contractual* right to respect picket lines (Point IV, *infra.*).

Always bearing in mind the limited situation with which this case deals, a decision holding Respondent's conduct an unfair practice could not be squared with the authorities dealt with hereinabove, particularly those discussed in II A of this brief. There would be no way of stating the rule of this case without clashing with any reasonable generalization of the principles for which those authorities stand. *Sands*, for example, establishes the proposition that a genuine strike is not a protected concerted activity where it is designed to impose conditions of employment varying from those established in the collective agreement. As already observed herein, it is difficult to see how individual

action reflecting an individual sentiment can be given protection in the name of Section 7 that this Court in *Sands* denied to genuinely concerted action for mutual aid and protection. *Republic Aviation* establishes that the employer may lawfully restrict employee exercise of the right of self-organization to non-working time. Since there is nothing in the Act which indicates that Congress placed any more emphasis on concerted action than it did on self-organization, and since in fact the two are treated exactly alike in Section 7, it is difficult to see how this Court can penalize Respondent for refusing to permit Waugh to use company time for his own purposes, without departing in essential principle from the position which it took in *Republic Aviation*. Again, in *Briggs-Stratton*, this Court declared that a genuinely concerted action for mutual aid and protection was not absolutely immunized by Section 7. The theory there was that Section 7 protects only those basic and essential labor rights which the law of criminal conspiracy would deny. Those central, basic rights are the right to join a union, the right to bargain collectively, and the right to withhold labor in concert by way of a clean straightforward strike. If this Court should now hold that respecting a picket line is a basic labor right equivalent in statute to those rights, it would negate the strength, the simplicity, and the historical accuracy of its decision in *Briggs-Stratton*. More than that, it would cast the whole question of the scope of Section 7 into endless confusion, with nothing but the Board's vague conception of "traditional labor action" as a guide. *Cf. Colgate-Palmolive-Peet, supra.*

Reversal of the court below in this case would not only cast doubt on the Court's own decisions of the very recent past; it would also appear to be a deliberate affront to the express Congressional hope for continued circumscription of the scope of Section 7, and a refusal to credit the serious-

ness of Congress in confirming the right of employers to discharge for "cause." Congress plainly approved this Court's decisions in *Fansteel, Sands,* and *Southern Steamship, supra.* Moreover, there can be little doubt of its approval of *Briggs-Stratton,* although that decision was handed down after the Act was amended in 1947; and the Congress has not yet formally spoken on the matter. No one can seriously contend that affirmance of the decision of the court below would amount to a flouting of congressional intent.

Waugh's activity falls completely naturally into the category of the "partial strike" or the "unilateral dictation of terms of employment" condemned in *Conn, Montgomery Ward,* and *Home Beneficial Life Insurance Co., supra.* To hold it privileged would be to cast those decisions in serious doubt despite their patent good sense and fidelity to the statute. This would be so because it would seem anomalous to hold that the genuinely concerted action for mutual aid and protection present in those cases is subordinate in status to action such as Waugh's, which was neither concerted nor, in any proper sense, for "mutual aid and protection."

Finally, reversal of the court below would, paradoxically enough, vitiate the doctrinal foundation of some of the most promising of the Board's own recent decisions. The Board has recently held that a slowdown is not protected by Section 7 even though it is a manifestly concerted activity for mutual aid and protection. *Elk Lumber Company,* 91 NLRB 333. The Act does not *expressly* declare that a slowdown is not a concerted activity within the meaning of Section 7. There is no hint in the Act itself that Congress intended to make a slowdown unlawful. One cannot even accurately state that the slowdown and asso-

ciated techniques are not "traditional" labor activities (*cf. Slichter, Union Policies and Industrial Management,* 164 *et seq.* (1941)). On what basis, then, does the Board hold a slowdown unprotected? The answer, interestingly enough, is that the Board has built on the theory of *Briggs-Stratton, Conn, and Montgomery Ward, supra.* That it has done so is apparent from its citation of *Briggs-Stratton* (called the *"Wisconsin"* case in the following quotation) and its paraphrase of language from *Conn* and *Montgomery Ward* in developing its rationale:

> "The vice of the slowdown derives in part from the attempted dictation by employees, through this conduct, of their own terms of employment. They are accepting compensation from their employer without giving him a regular return of work done. In the *Wisconsin* case, the Supreme Court recently likened to a slowdown a union's intermittent work stoppages following unsuccessful bargaining negotiations and described both as 'coercive.'
>
> "In the instant case, by engaging in the slowdown, the Union subjected the Respondent to a partial strike designed to bring pressure for acceptance of its terms." *Phelphs Dodge Copper Products Corp.,* 101 NLRB No. 103 (Nov. 1952) at page 10 of the mimeographed report.

In another very recent case, *Crucible Steel Castings Company,* 101 NLRB No. 105, the Board has again revealed its implicit agreement with the view of the law which Respondent urges upon the Court here. *Crucible* is a case involving the discharge of one Flagg, a "shop chairman" whose duties involved the processing of grievances. The discharge was based on Flagg's defiance of posted company rules requiring employees to stay at their jobs unless permission to leave was granted, and on his failure to

abide by the rules fixed in the collective agreement concerning the processing of grievances. Specifically, Flagg had left his job to investigate grievances during working time, without securing permission, and had at times infringed upon working time in connection with grievance conferences which had started during free time. This had gone on for some time before the employer fired Flagg, after having warned him twice, on the day of the discharge, to abide by the shop rules. Rejecting the contention that the discharge restrained or coerced Flagg in the exercise of rights granted by Section 7, the Board said:

> "In view of Flagg's violation of shop rules, his refusal to comply with his foreman's direction to return to work, and, particularly, his persistence in disregarding the provisions in the contract for handling grievances, we find that Flagg's discharge was not in violation of Section 8 (a) (3) and (1) of the Act." (*Id.* at p. 2, mimeographed report.)

We have contended at various points that the Board is asking the Court in this case to reverse its own decision in *Briggs-Stratton* and to reject the holdings in *Conn* and *Montgomery Ward*. We must now add that the Board apparently seeks the vitiation of its own holdings and rationale in such cases as *Elk Lumber, Phelps Dodge* and *Crucible Steel, supra*. That it is accurate so to characterize the Board's position here becomes evident when one considers that the statement quoted from the Board's decision in *Phelps Dodge* is a virtually perfect description of Waugh's conduct in this case: an "attempted dictation by [an employee] . . . of [his] . . . own terms of employment"; an "accepting [of] compensation from [the] . . . employer without giving him a regular return of work done;" "a partial strike. . . ."

The slowdown condemned by the Board in *Phelps Dodge* was effected by a majority union during bargaining negotiations. It was, therefore, a genuinely concerted action for mutual aid and protection. We of course do not contend that merely by virtue of its being such, it was entitled to the protection of Section 7. We are simply unable to understand how the Board can hold as it did in *Phelps Dodge* and at the same time argue to this Court that an individual act having only a very dubious claim to the description of "concerted activity for mutual aid and protection" is entitled to the protection of Section 7.

We respectfully submit that the Board's rationale in *Phelps Dodge* bears out our major contention: A refusal to cross a picket line in the circumstances of this case falls naturally within the conception of unprotected concerted action which the courts and the Board have fashioned, and which Congress has approved.

Crucible is even closer to the present case, making Respondent's position here virtually an *a fortiori* one. In *Crucible*, the dischargee was beyond any question engaging in the kind of activity with which Section 7 is concerned. The prosecution of grievances is inherently a part of the concept of collective bargaining and mutual aid and protection. *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262; *Olin Industries, Inc.*, 86 N.L.R.B. 203; *Weisfields, Inc.*, 88 N.L.R.B. 541. Nevertheless the Board held in *Crucible*, as it has indeed held previously (*Conversa Bridge & Steel Co.*, 49 N.L.R.B. 374; *Empire Box, Inc.*, 79 N.L.R.B. 1011), that such activities must be prosecuted in free time, that certainly they may not be pursued during working time where the employer's rules and specific orders prohibit such inroads upon working time.

Conclusion on Point II.

The statute, the clearly expressed congressional intent, and the uniform course of decision militate directly against the position advanced by the Petitioner and in favor of the Respondent's position. The Petitioner's view finds no support in the statute or in the relevant authorities. Moreover, Petitioner argues explicitly for the rejection of the conclusions reached by the Courts of Appeals in *Conn, Montgomery Ward,* and *Home-Beneficial Life Insurance Co., supra,* and implicitly for reversal by this Court of its decision in *Briggs-Stratton.* Beyond these considerations, Petitioner's view would disperse into confusion the conception of the statute first voiced by this Court in *Jones & Laughlin, supra,* and consistently maintained throughout the cases discussed in this brief, to the present day. Finally, Petitioner's present contention is inconsistent with even its own decisions—and very recent ones at that.

III.

A discharge of an employee does not violate Section 8(a)(3) where it is not intended to encourage or discourage membership in any labor organization, and could not conceivably have any effect of that kind.

In its decision and order (93 NLRB 336), the Board held that Respondent had in discharging Waugh violated Section 8(a)(3). That position was maintained by the Board in the proceedings before the court below. Nothing is made of it, however, in the Board's petition for certiorari

or in its brief.[7] Respondent deals with the point because analysis of the facts in the light of Section 8(a)(3) and the authorities thereunder aids materially in clarifying other issues posed by this case and accordingly in the reaching of a proper result.

Section 8(a)(3) provides in material part that it is an unfair practice for an employer

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

From the beginning, this provision has never been thought to provide complete immunity for union members against discharge or any other form of discipline.

Thus in *Jones & Laughlin*, 301 U. S. 1, 45 (1936):

> ". . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when

[7] The only reference to Respondent's discharge of Waugh as a violation of Section 8(a)(3) is to be found in footnote 32 on page 66 of Petitioner's brief. There the suggestion is made that the discharge violated 8(a)(3) because it "thus discouraged membership" in the *Typographical* Union. This is an almost incredible caricature of illegality by presumption. It is plainly the kind of arbitrary and unreasonable action by the Board which the 80th Congress so frankly condemned and which it hoped to forestall by the changes it made in Sections 10(b), (c) and (e). *Sen. Rep. No. 105* on S. 1126, 80th Cong., 1st Sess. p. 26, 26; H. R. Rep. No. 510 on H. R. 3020, 80th Cong. pp. 53-56. Cf. *N. L. R. B.* v. *Universal Camera Corp.*, 340 U. S. 474 (1950).

that right is exercised for other reasons than such intimidation or coercion."

The Court has expressed itself similarly ever since. *Associated Press* v. *NLRB*, 301 U. S. 103 (1936); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1937); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1938); *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1938); *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1940); *Phelps Dodge* v. NLRB, 313 U. S. 177 (1940); *Southern S. S. Co.*, v. *NLRB*, 316 U. S. 31 (1941). And as recently as this year, in *NLRB* v. *American National Insurance Co.*, 343 U. S. 395 (1952), this Court used similar care in defining the extent to which the Act has qualified the pre-existing rights of employers.

A certain amount of diffusion of doctrine is inevitable in connection with any provision which has been litigated so often and so variously as Section 8(a)(3). Nevertheless, decisions by both the Board and the Circuit Courts of Appeals establish certain well-defined prerequisites to a violation of the section. At the most, the courts have required the Board to prove that a discriminatory discharge has had the *actual effect* of encouraging or discouraging membership in a labor organization. *NLRB* v. *Air Associates, Inc.*, (C. A. 2, 1941) 121 F. 2d 586; but see *NLRB* v. *Cities Service Oil Co.*, (C. A. 2, 1942) 129 F. 2d 933; *Stonewall Cotton Mills, Inc.* v. *NLRB* (C. A. 5, 1942) 129 F. 2d 629; *Western Cartridge Co.* v. *NLRB*, (C. A. 7, 1943) 139 F. 2d 855.

At the least, the Courts have required proof of *intent* to encourage or discourage union membership and *probability* that union membership will be discouraged. *N. L. R. B.* v. *J. G. Boswell Co.* (C. A. 9, 1943) 136 F. 2d 585; *N. L. R. B.* v. *Brezner Tanning Co, Inc.* (C. A. 1, 1944) 141 F. 2d 62; *N. L. R. B.* v. *Vail Mfg. Co.* (C. A. 7, 1947) 158 F. 2d 664.

It had become well settled by 1947, when the Act was amended, that a discharge which the evidence demonstrated to be motivated by normal business considerations, rather than by a desire to encourage or discourage union membership, did not violate the Act. *Biles-Coleman Lumber Co.*, 4 NLRB 679 (1937); *Link Belt Co.*, 26 NLRB 227 (1940); *N. L. R. B.* v. *Williamson-Dickie Mfg. Co.* (C. A. 5, 1942) 130 F. 2d 260; *N. L. R. B.* v. *Kopman-Woracek Shoe Mfg. Co.* (C. A. 8, 1946) 158 F. 2d 103; *N. L. R. B.* v. *Reynolds Int'l Pen Co.* (C. A. 7, 1947) 162 F. 2d 680; *N. L. R. B.* v. *Reliable Newspaper Delivery Inc.* (C. A. 3, 1951) 187 F. 2d 547.

In 1947, Congress crystallized this general development by providing, in Section 10(c), that the Board has no power to award reinstatement and back pay to employees who have been discharged for cause, and by stating that "This, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." *House Conference Report* No. 510, 80th Cong. 1st Sess., pp. 38-40 (App. p. i).

The Board in this case awarded reinstatement and back pay to an employee who was discharged for "cause", as that term had been established by the weight of authority prior to 1947 and as it was understood by Congress when it amended the National Labor Relations Act in 1947.

The most attentive perusal of the Board's decision in this case fails to turn up any evidence of an effort by the Board to satisfy even the minimal requirements of proof of an 8(a)(3) violation which have been established in the seventeen years of interpretation which that section has undergone.[8] The reason for this failure is of course clear. The undisputed facts of this case are such that not even the minimal requirements could be shown. The Respondent

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[8] See Footnote 7, *supra*.

has dealt for forty years with Waugh's union. Waugh has been a member of that Union for over twenty years and an employee of Respondent for seven years. Respondent repeatedly urged Waugh to reconsider his refusal to cross the picket line, before firing him (R. 64 *et seq.*) How such facts could be reconciled with an intention to discourage Waugh's membership in a labor organization—an intention which the Board has made no effort to demonstrate—is impossible to understand. Equally impossible to understand is how the discharge of Waugh could have had even the *possible* effect of discouraging his membership in either his own union, the Typographers, or any other union. So far as is known, Waugh never sought membership in the Typographer's Union; and it is virtually certain that if he had, his application would be denied for lack of suitable qualifications. Finally, the evidence will not yield to a characterization of the discharge as "capricious." *E. Hubschman & Sons, Inc.*, 14 NLRB 225 (1939).

By a process of elimination then, we reach the conclusion that the discharge must have been for "cause." And the indisputable "cause" was Waugh's refusal to perform all of his duties. From Waugh's point of view, his refusal to cross the picket line "caused" his discharge. But Waugh's is not the point of view which is relevant here. The relevant point of view is that of the employer, the person charged with an unfair practice the existence of which turns upon his motivation. *Jones & Laughlin, supra,* and other cases cited. From the point of view of the employer, the vital, operative fact was, not that Waugh had respected a picket line, but that Waugh's refusal to perform the duties he was being paid to perform amounted to a violation of explicit and implicit contractual arrangements and obstructed the business operations which those contractual

arrangements were designed to serve. The employer would have reacted in the same way if Waugh had neglected his duties in order to go to a ball game, or a race track, or a movie.

There is therefore no basis for the Board's holding that Respondent violated Section 8(a)(3). The discharge was for cause, within the meaning of Section 10(c). That is what the permanent impartial chairman held (R., p. 69), and it has never been disputed, for, as we shall now demonstrate, Waugh's conduct was a plain violation of his understanding with Respondent as expressed in the collective agreement and in the implicit contract of employment.

IV.

A discharge for a deliberate violation of both an implicit contract of employment and a collective agreement is a discharge for cause and not a violation of the Act.

Waugh's refusal to perform all the work he had undertaken to perform was, as we shall presently demonstrate, a plain, knowing, and deliberate violation of both the spirit and the letter of the collective agreement between Respondent and Waugh's union, the Newspaper and Mail Deliverers' Union. As such it provided a complete justification for his discharge, under the Act and the relevant precedents.

Petitioner asserts that since it has in a separate proceeding held the whole contract invalid because of an invalid union-security provision (94 N. L. R. B. 1056), and since the court below failed to pass on the contract, "no contract issue obscures consideration of the important questions presented here." (Petition, p. 9, note 3.) This is entirely too convenient and airy a dismissal of a most significant

factor in this case. Full appreciation of this case requires consideration of the collective agreement, which still governs relations between Respondent and Waugh's Union and which the Board itself has taken no steps in court to dissolve. Furthermore, the Board has plainly misrepresented the status of the agreement. In its brief (p. 8, note 3), the Board asserts that the Second Circuit, in *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719 (1952) (certiorari pending as No. 371 this Term), entered a decree enjoining performance of the contract in question. That statement is flatly wrong. In fact, the Second Circuit expressly refused to invalidate the whole contract. It said, in referring to the contract, that:

> "The illegality in this contract lay solely in the union's failure to secure prior approval from a majority of employees for the union-security clause—a requirement since abolished by Congress in 1951 as burdensome and unnecessary. That approval can no longer be secured at this late date, nor is it necessary to any new contract." (*Id.*; p. 724.)

And it went on, after noting that the total invalidation of the contract urged by the Board would serve no good purpose, expressly to deny enforcement of those parts of the Board's order which would negate the entire contract and future relations between the union and the employer:

> "We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification." (*Id.*)

These are the Second Circuit's words in the *Gaynor* case. They demonstrate the error in Petitioner's statement to

this Court that the contract in question has been invalidated by the Second Circuit.

Far from "obscuring" the "important questions presented here," the collective agreement between Respondent and the Newspaper & Mail Deliverers' Union constitutes one of the vital, operative facts of this case. Of course, facts are sometimes unwieldy and intractable elements; they sometimes embarrass and hinder the reaching of a result which has been formulated on an arbitrary and *a priori* basis. In such circumstances, the convenient thing to do is to forget them, or, even better, to act as though the facts do not exist. But such an attitude toward the facts of a case perverts the judicial process and tends to produce a more or less damaging flaw in the decision. In any event, disregard of facts scarcely tends to clarify consideration of a case. So, here, it is difficult to find any good reason for the Board's continued insistence upon disregard of the collective agreement which governed employment terms and conditions in Respondent's business at the time Waugh was discharged.

Along with the usual provisions to be found in most collective agreements, the agreement in question contains a provision prohibiting all strikes, lockouts, or other types of cessations of work or interferences therewith.[9] The full text of this provision runs as follows:

> "19-n. No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, order or award of the Adjustment Board." (B. A. 61)

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[9] It is interesting to note that the Board refers to this provision as if it contained only a prohibition of strikes. (Petitioner's brief, p. 63, note 27.) The Board omits any reference to the prohibition of "other cessation of work or interference therewith."

The value of this provision to Respondent and the newspaper industry can scarcely be exaggerated. Time is of the essence—there is nothing more moribund than the last edition's headlines. Even the briefest of work stoppages or quickie strikes causes serious loss and operational embarrassment. The Board itself recognized the tremendous impact of "quickies" upon the Metropolitan Press. *Cf. Jaffe* v. *Newspaper & Mail Deliverers' Union*, 97 F. Supp. 443 (S. D. N. Y. 1951).[10] One need not dwell at length, therefore, upon the concessions which Respondent has had to make and the determination which it has had to exercise during the forty years of its dealing with the Union, to preserve this provision.

In 1948, the Union proposed for incorporation in the collective agreement a clause providing that:

"No man shall be required to cross a picket line."

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[10] The Board sought an injunction in the United States District Court for the Southern District of New York restraining the Newspaper and Mail Deliverers' Union

> "from violating Section 8(b) subsection (2) of the Act, in any manner by causing or attempting to cause the Times, Mirror, News, Herald Tribune, Journal-American, or any other newspaper in New York or vicinity to discriminate in any manner against employees in violation of Section 8(a), subsection (3) of the Act."

Judge Leibell granted a permanent injunction, after a nine day hearing, which completely reviewed the course of unlawful conduct of the Newspaper and Mail Deliverers' Union and its officials and the impact of that course of conduct upon the delivery of newspapers in the Metropolitan area. In its opinion, the Court used the following language:

> "A free press is essential to the perpetuation of our form of government. To permit a comparatively few men to halt the publication of our city newspapers, in order to accomplish a clearly illegal purpose, is too great a threat to our freedom to let it go unchallenged. We should learn from the experience of people in other lands. Although I am opposed to the issuing of injunctions against labor unions, there are at times situations of great public interest where the reckless and law-defiant conduct of a few cannot otherwise be controlled. This is such a case." (97 F. Supp. 443, 450.)

The Respondent and other newspaper wholesalers vigorously opposed the provision. It was never incorporated in the agreement.

Respondent at the hearing in this case offered to prove that Waugh was one of the persons who had urged the rejected clause (R. 70).

In the light of this factual background, it seems accurate to state that Waugh's refusal to enter the *Star* premises in the normal performance of his duties was the plain, knowing, and deliberate violation of both the spirit and the letter of the collective agreement which we have already called it.

Ever since *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939), it has been accepted that employees who violate collective agreements render themselves vulnerable to discharge. As was said in that case: "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (Id. at 344). The Board itself has often used such language as the following, in decisions holding that an employer may discharge employees who have violated an agreement: "The right of discharge for violation of contract, is well established." *Copperweld Co.*, 75 NLRB 188, 194; see also *National Electric Products Corp.*, 80 NLRB 995.

Under the facts and the authorities gathered here and in the preceding point there can be no doubt whatsoever that the discharge of Waugh did not violate the Act. But a remaining question is whether, because the Board found unlawful provisions in the collective agreement, the whole agreement has become irrelevant to this case.

As a matter of the general law of contracts, it seems fairly evident that the agreement remains a binding contract, despite the Board's holding that its union security clause and other provisions violated the Act. The contract

contains a "separability" clause which states that: "In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect." (R. 60-61). Normally at common law, even in the absence of such a separability clause, the performance of legal provisions of a contract will be enforced in accordance with the intention of the parties despite the illegality of other, distinct promises contained in the agreement. American Law Institute, Restatement of Contract, Section 607. All the authorities, from antiquity to the present day, support this proposition. *Holdsworth* (8 History of English Law 53 *et seq.*) quotes from *Pigot's* case, (1615) 11 Co. Rep. at f. 27b to this effect: "It is unanimously agreed in 14 H. 8 25, 26 that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good." The modern writers and authorities concur. Corbin agrees that the decisions enforcing valid parts of an agreement which contains unlawful provisions are justifiable, although "only on the ground that the illegality was not heinous in character, partial enforcement does not harm the public, and refusal of enforcement would be too severe a penalty or cause an unjust forfeiture." 6 Corbin on Contracts §1522, p. 1009. *Williston*, nodding to *Pigot's* case, has this to say: "It was early decided that where some covenants of an indenture are legal and others illegal the legal covenants may be enforced. . . . If legal consideration has actually been given . . ., the rule thus early established has never been questioned." 6 Williston on Contracts §1779, p. 5060. Squarely in point are the cases cited in support of the proposition: *Gelpcke* v. *Dubuque*, 1 Wall. (68 U. S.) 221;

McCullough v. *Virginia*, 172 U. S. 102; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584. The Court in the latter case quotes approvingly (at p. 590) the blunt language used in *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. C. 235, 250: "... where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

The agreement involved in the present case was invalidated by the Board on two grounds: (1) because it contained a union-shop provision whose execution had not been authorized by the employees in the kind of election then required by the Act, but not now required (Act of October 22, Pub. L. 189, 82nd Cong., 1st Sess.); and (2) because it granted to union members greater "fringe benefits" than were accorded non-union men. *Rockaway News Supply Co.*, 94 NLRB 1056, 1058.

There can be little doubt that these features, besides being but a relatively minor part of the agreement, were clearly divisible from those lawful provisions which formed far the greater and more essential parts of the agreement. The Board's own decision and order in the case show how readily the illegal aspects could be remedied, without destruction of both the whole contract and the orderly industrial relations which the contract represented and which the Act was designed to promote. In that decision the Board ordered the employer and the union to cease giving effect to the unlawful union shop clause and to make the nonunion employees whole for the fringe losses they had suffered.

Thus, even on the basis of Corbin's test, *supra*, it would appear that the Board has gone too far in invalidating the whole contract. The illegal provisions were clearly

separable; "the illegality was not heinous in character"; enforcement of the lawful provisions would not "harm the public"; and "refusal of enforcement would be too severe a penalty or cause an unjust forfeiture." (*Corbin, supra.*)

There is a serious question, furthermore, as to the bare power of the Board to vitiate the whole contract, at least for general purposes. The Board could refuse to consider the contract a bar to an election, if another union should file a representation petition, since the concept of an existing contract as a bar to an election is one of the Board's own making. (*House Conference Report* No. 510 on H. R. 3020, 80th Cong. 1st Sess., p. 50.) But total vitiation is another matter. The collective agreement has been recognized in Section 301 of the Labor Management Relations Act 1947 as a lawful contract in interstate industries. 61 Stat. 136 (1947), 29 U. S. C. § 141 *et seq.* (1950). It has long been regarded as such in the State of New York. *Hudak* v. *Hornell Industries, Inc.*, 304 N. Y. 207 (1952). No one has ever suggested that, in addition to its other duties, the Board was given the function of administering the general contract law of the nation. Whether or not its holding in *Rockaway* could lawfully operate to vitiate an agreement made enforceable by both federal and state law would therefore seem dubious, especially in the light of decisions by this Court. Thus in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 235 (1938), the Court said:

> "* * * the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. * * * We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

Presumably the Board could invalidate the contract if it were made with a union which was not genuinely the representative of a majority of the employees in the appropriate bargaining unit. *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940)). But it has never been contended, let alone held, that the Newspaper and Mail Deliverers' Union is dominated by the employers with whom it deals. The *Jaffe* case, *supra*, contains proof to the contrary. In fact, the forty years of bargaining between the union and Respondent have fully satisfied the definition of "arms-length" bargaining advanced in the relevant decisions of this Court. *NLRB* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282 (1941); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U. S. 318 (1939); *NLRB* v. *Falk Corp.*, 308 U. S. 453 (1939); *NLRB* v. *Link-Belt Co.*, 311 U. S. 584 (1940); *NLRB* v. *Pacific Greyhound Lines*, 303 U. S. 272 (1937); *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1937); *NLRB* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50 (1942); *NLRB* v. *Virginia Electric and Power Co.*, 314 U. S. 469 (1941); *Westinghouse Electric & Mfg. Co.* v. *NLRB*, 312 U. S. 660 (1940).

In the circumstances, invalidation of the entire contract was neither called for nor authorized by the Board's power and duty to effectuate the policies of the Act. Invalidation of the entire contract could serve only to frustrate the policies of the Act. By vitiating the end-product of the collective-bargaining process, the Board actually threatened the industrial peace and order which the Act was designed so wholeheartedly to promote.

But it is difficult to see how the Petitioner gains in this case from insisting that the collective agreement be disregarded. Absence of a collective agreement does not destroy either the employer-employee relationship, with all its attendant common-law rights and duties, or the implicit contract of employment which necessarily governs

any employment relationship in a free society. In the absence of a collective agreement, the employee is not freed of the obligation of following the lawful orders issued by the employer or his duly designated agents. On the contrary, at common law, and in the absence of an agreement to the contrary, the relationship of master and servant obtains. *Pennsylvania Casualty Company* v. *Elkins*, 70 F. Supp. 155, 159 (1947). And the common law had no doubts concerning the right of the master to direct his working force, the right of the master to discharge the insubordinate or unwilling employee. *Horowitz* v. *Daily Mirror*, 258 N. Y. S. 39. *In re Nowicki's Claim*, 289 N. Y. 566; *In re Electrolux Corp.*, 286 N. Y. 390.

Thus, even assuming the absence of a collective agreement, the situation remains the same. The Respondent discharged Waugh because, as the arbitrator found, Waugh had been insubordinate in refusing to obey his foreman's order. Whether the insubordination be held a violation of the collective agreement or of the implicit contract of employment, it provides the basis of the discharge; and the discharge, therefore, is a discharge for "cause." The fact that the insubordination was expressed in a refusal to cross a picket line can scarcely alter the case, as we have shown at such length, in Point II, *supra*. As shown there, the Board itself has held that neither a slowdown nor the prosecution of grievances, although both are more clearly Section 7 activities than Waugh's action here, provides a privilege for insubordination. *Elk Lumber Co.*, *Phelps Dodge*, *Crucible Steel*, *supra*. The Courts of Appeals have held that neither a concerted refusal to work more than a certain number of hours (*Conn*, *supra*), nor a concerted insistence on performing only a part of one's duties (*Montgomery Ward*, *supra*), nor a concerted refusal to report to work (*Home Beneficial*, *supra*), privileges defiance of

the employer's lawful orders. Finally, this Court has held that an "installment-plan strike" is, though manifestly concerted action, not a concerted activity protected by the Act (*Briggs-Stratton, supra*); and that a strike to compel a violation of a collective agreement, again manifestly concerted action, is not protected concerted activity (*Sands, supra.*)

These cases, together with the authorities and the considerations advanced in the preceding point of this brief—establishing the right of the employer to discharge for "cause"—demonstrate the legality of Respondent's discharge of Waugh. The House Conference Report spoke definitively for Congress on the subject matter of this case when it said that the employer's right to discharge employees for "cause," expressly preserved in Section 10(c) of the amended Act, "applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." (Appendix, p. iii).

Conclusion.

For the reasons stated, the judgment of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX.

From House Conference Report No. 510 on H. R. 3020, 80th Cong., 1st Sess. (pp. 38-40):

RIGHTS OF EMPLOYEES

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First,* it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second,* it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of Section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.,* 149 F. 2d 987 (1944)).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company* case (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage stabilization laws. Again, in the *Scullin Steel* case 65 N. L. R. B. 1294) and in the *Dyson* case (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products* case (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended

National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practical, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted

activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) ~~By~~ discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organiza-

tion has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

(c) * * * No order of the Board shall require the reinstatement of an individual as an employee who has been suspended or discharged, or the pay-

ment to him of any back pay, if such individual was suspended or discharged for cause.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *